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Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

October Term, 1993

Blaine A'mmon White, Petitioner

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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238 pp

QUESTION PRESENTED

Whether the collateral estoppel doctrine forecloses a subsequent criminal prosecution involving the same set of operative facts, emanating from the same transaction, where the defendant interposed the same single issue defense, whereupon the first jury returned a verdict of acquittal on one count but disagreed on the remaining count, and the second jury convicted defendant on the count previously unresolved.

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Blaine A'mmon White, Petitioner

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Blaine A'mmon White, *pro se*, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., infra, A) is reported at, 1 F.3d 13 (D.C.Cir. 1993).

The companion opinion of the United States Court of Appeals for the District of Columbia Circuit (App., infra, B) is reported at, 936 F.2d 1326 (D.C. Cir. 1991). The opinion of the United States District Court for the District of Columbia (App., infra, C) is reported at, 757 F.Supp. 45 (D.C.D.C. 1990). The judgement of the United States Court of Appeals for the District of Columbia Circuit, (App., infra, A), No. 92-3130, was entered July 27, 1993. Petitioner filed a timely petition for rehearing, (App., infra, H), and a petition for rehearing *en banc* (App., infra, I), on September 3, 1993. Both petitions were denied on October 1, 1993; (App., infra, E and F). Petitioner filed a Motion for Stay of Mandate on October 7, 1993; (App., infra, G), said Motion was granted October 22, 1993. (App., infra, F). This

petition for writ of certiorari was filed on November 19, 1993.

JURISDICTION

The jurisdiction of this Court rests on Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, PROVIDES: "NOR SHALL ANY PERSON BE THE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB."

STATEMENT OF THE CASE

On March 20, 1990, a federal grand jury charged petitioner, and a co-defendant, Harold David Linden, in a two count indictment alleging the following: Count I, that petitioner and a co-defendant knowingly possessed a birth certificate in the name of William Smith

Baldwin with the intent that such document be used to defraud the United States in violation 18 U.S.C. §§ 1028 (a)(4) and; Count II, making false statements in an application for a passport for the use of Harold David Linden in violation of 18 U.S.C. § 1542.

The co-defendant entered a guilty plea as to both counts of the aforesaid indictment on June 28, 1990; prior to the start of petitioner's trial on the same day.

Petitioner was the only fact witness in his behalf. Petitioner's only defense to both counts was that he had always known Linden as Baldwin, and did not know Baldwin was dead. (App., infra, B-13 thru B-14, O-4, P-4 thru P-8, and Q-3). At the close of all of the evidence, petitioner moved for judgement of acquittal. During arguments before the district court in

opposition to petitioner's motion, government counsel acknowledged that the only issue for the jury to resolve was the knowledge/intent of petitioner at the time he committed the acts alleged. (App., infra, O-4). "[I]t's the government's position that the actual acts charged are not in dispute and the issue only [sic] is the intent of the defendant [petitioner] at the time he performed the acts."

Petitioner's motion was denied. During its summation, the government maintained once again that the "sole" issue was the knowledge/intent of defendant (petitioner). (App., infra, N-23). Furthermore, among the instructions given to the jury was a special jury instruction requested by petitioner which crystallized the knowledge issue in the context of the facts adduced at trial. (App., infra, J-2, J-4).

On July 3, 1990, the jury returned a verdict of acquittal with respect to Count I of the indictment. Nevertheless, the jury disagreed with respect to Count II. The district court granted a mistrial on even date. On July 25, 1990, the government moved, before the district court, for dismissal of Count II of the indictment without prejudice. (App., infra, B-9). The district court granted said motion. Defendant was re-indicted on October 9, 1990, along with a co-defendant Thomas G. Weyforth, and charged in a four count indictment as follows: conspiracy in violation of 18 U.S.C. § 371; making false statements in application for a United States passport for Harold David Linden, an alien, in the name of William Smith Baldwin, in violation of 18 U.S.C. § 1542; concealing, harboring, and concealing from detection Harold David

Linden, an alien who had come into, entered and remained in the United States in violation of the law, 18 U.S.C. § 1324 (a)(1)(c); and, aiding and abetting 18 U.S.C. § 2. Count IV of the second indictment was the same count upon which the jury was unable to agree in the initial prosecution of petitioner. (App., infra, B-10).

On November 16, 1990, petitioner filed a Motion to Dismiss the second indictment based on the grounds of Double Jeopardy and collateral estoppel pursuant to Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Petitioner argued that because there was but one single issue defense raised by petitioner with respect to both counts of the initial indictment that the said issue, i.e., knowledge, was the ultimate issue which the jury, in returning its verdict of

acquittal, had foreclosed from further prosecution. The district court, however, denied petitioner's motion on December 20, 1990. The opinion of the district court is reported at United States v. White, 757 F.Supp. 45 (D.C.D.C. 1990); (App., infra, C-2 thru C-31).

Upon the denial of petitioner's motion, petitioner filed an interlocutory appeal pursuant to Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). On June 28, 1991, the United States Court of Appeals for the District of Columbia Circuit denied petitioner's appeal, thus clearing the way for a second trial. The court of appeals in rejecting petitioner's Double Jeopardy contention, opined that the fact of the hung jury as to Count II of the first indictment against petitioner was a finding inconsistent with the verdict of acquittal

reached on Count I of the same indictment despite the fact of a common single issue defense. (App., infra, B-13 thru B-17).

The court of appeals decision allowed for the re-trial of petitioner as to Count II of the initial indictment (in its current form as Count IV of the second indictment) as well as the three newly alleged violations. Petitioner's second trial commenced on March 3, 1992. Prior to the trial, petitioner filed a Motion in Limine. The said motion sought to prohibit the government from introducing any evidence concerning the acquitted behavior of petitioner with respect to the Baldwin birth certificate. (App., infra, R). The district court denied petitioner's motion. Petitioner then requested a special jury instruction (App., infra, K-2) to limit the scope and effect of the birth certificate evidence

pursuant to Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). The rationale for petitioner's request were Double Jeopardy and collateral estoppel. This request was also denied. (App., infra, L-3 thru L-7).

The government re-introduced, in total, the evidence from petitioner's initial trial with respect to the document fraud count (Count I, of which petitioner was acquitted). All of petitioner's conduct, regarding acquisition and transfer of the fraudulent birth record, was also re-introduced. The objections of petitioner as to both the aforesaid were overruled by the district court. (App., infra, M-6 thru M-14, at M-10).

On March 5, 1992, the jury returned a verdict of acquittal as to two counts of the second indictment against petitioner.

With respect to Count IV (the unresolved count from the initial prosecution of petitioner), a finding of guilt was returned. In addition, petitioner was found guilty of aiding and abetting passport fraud. (App., infra, A-10).

Petitioner was sentenced on May 13, 1992 to a one year term of imprisonment, 200 hours community service, two years supervised probation, and ordered to pay a $100 special assessment.

On May 15, 1992, petitioner appealed the aforesaid convictions. Petitioner asked the United States Court of Appeals for the District of Columbia Circuit to overturn his convictions again based upon the doctrine of Double Jeopardy, and the rule of collateral estoppel; and requested that the court re-assess its earlier determination that collateral estoppel was

inapplicable. Additionally, petitioner also alleged a violation of his Double Jeopardy protection pursuant to Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2089, 109 L.Ed.2d 548 (1990). During the pendency of said appeal, this Court issued its opinion in United States v. Dixon, 509 U.S. ---, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), which overruled Grady, supra.

On July 27, 1993, the United States Court of Appeals for the District of Columbia Circuit affirmed petitioner's conviction, choosing not to revisit petitioner's collateral estoppel argument citing the law of the case, (App., infra, A-15), and rejecting petitioner's theory under Grady, supra, as the same had been overruled. (App., infra, A-14-15).

REASONS FOR GRANTING THE PETITION

1. The opinion of the United States Court of Appeals for the District of

Columbia Circuit rejecting petitioner's collateral estoppel argument is in conflict with the decisions of six of the eight federal circuits which have addressed the issue in the context of the case at bar. Only the District of Columbia Circuit and the First Circuit hold positions which are counter to that advanced by the petitioner and the federal circuit majority. In substance, the minority position holds that collateral estoppel is not applicable where there is a multi-count indictment arising from the same set of operative facts, involving the same transaction against which a single defense is interposed and there is a verdict of acquittal as to one count but the jury is hung with respect to the remaining count. The rationale of the minority hinges on their belief that application of the collateral estoppel

rule in the context of the case at bar would require an assumption that the jury acted inconsistently, reaching opposite findings on the same issue in different counts. (App., infra, B-17). The majority view is anchored in the belief that a hung jury decides nothing. Therefore, the jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful Double Jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts. United States v. Bailin, 977 F.2d 270, 279-280 (7th Cir. 1992), citing, United States v. Seley, 957 F.2d 717, 723 (9th Cir. 1992).

2. The decision of this Court in Dixon, supra, has created confusion, which only this Court can resolve, as to the

amount of Double Jeopardy protection afforded criminal defendants facing successive prosecutions in the absence of Grady, supra, which, Dixon, supra, overruled; while nonetheless leaving undisturbed, Illinois v. Vitale, 447 U.S. 410, 100 S.Ct 2260, 65 L.Ed.2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); and In re Nielsen, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed 118 (1889). This line of precedents indicates that criminal defendants have additional Double Jeopardy protection with respect to use of prior acquitted conduct in a subsequent prosecution. However, since Dixon, supra, one does not know, with any degree of certainty, what that protection is. Therefore, further review is thus warranted.

ARGUMENT

I.

BY ITS VERDICT OF ACQUITTAL, THE JURY AT THE PETITIONER'S FIRST TRIAL DETERMINED THE ONLY CONTROVERTED ULTIMATE ISSUE OF FACT; I.E., KNOWLEDGE, IN FAVOR OF PETITIONER; A SUBSEQUENT PROSECUTION ARISING FROM THE SAME SET OF OPERATIVE FACTS INVOLVING THE SAME TRANSACTION IS PRECLUDED BY THE RULE OF COLLATERAL ESTOPPEL.

A comparison of the records from both of petitioner's trials makes it abundantly clear that, as to all charges, in both prosecutions, petitioner interposed the same single issue defense; i.e., lack of knowledge. With respect to the first prosecution, see (App., infra, B-13 and 14, N-22 thru N-25, O-4, P-4 thru P-8, and

Q-3); with respect to the second prosecution, see (App., infra, A-3 thru A-4, L-7 thru L-11, and M-5).

Regarding both prosecutions, the government admitted that the only issue was knowledge, and that all of the acts were intertwined. As to the first prosecution, see (App., infra, N-23-25, O-4, P-4 thru P-8). As to the second prosecution, see (App., infra, L-9 thru L-12 and M-5). Additionally, the jury in the first proceeding was instructed in a specific fashion as to the issue of knowledge in the context of the facts adduced at trial. (App., infra, J-2, J-4). Thus, unlike other cases involving the application of the collateral estoppel rule, one has no difficulty in identifying the ultimate issue of fact in the case at bar.

It is against the aforegoing backdrop

that the jury in the initial prosecution returned a verdict of acquittal with respect to Count I of the indictment, (document fraud), but was hung with respect to the passport fraud count. Because there was a single issue defense, and knowledge or the lack thereof was the ultimate issue to be decided, petitioner contends that the issue of knowledge was decided in favor of petitioner at the initial proceeding by virtue of the acquittal.

Ashe, supra, instructs that when an issue of ultimate fact has once been determined by a valid and final judgement, that issue can not again be litigated in any future lawsuit. Id., at 397 U.S. 442, 90 S.Ct. 1194. Furthermore, Ashe, Id., holds that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic

approach of a nineteenth century pleading book, but with realism and rationality. Where a previous judgement of acquittal was based upon a general verdict, (as the case at bar), this approach requires a court to "examine the record of the prior proceeding taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than which the defendant (petitioner) seeks to foreclose from consideration." Ashe, Id.

In light of the fact that there was a single issue defense as to all counts in the initial proceeding, which same defense was carried over into the second prosecution, the government's concession that knowledge was the only issue (App, infra, O-4), the government's summation (App., infra, N-23), and the special jury

instruction requested by petitioner (App., infra, J-2, J-4), a rational approach to the application of the collateral estoppel rule requires a finding that the ultimate issue of knowledge was resolved in petitioner's favor in the initial prosecution. Thus, the ultimate issue of knowledge is foreclosed from further consideration in any future proceeding between the same parties, as in the case at bar. See, Ashe, supra.

The United States Court of Appeals for the District of Columbia mistakenly opined that a hung jury is tantamount to a "finding". (App., infra, B-17). With all due respect, the flawed view of the District of Columbia Circuit is in opposition to the majority view which holds that a hung jury, by definition, is one which reaches no finding whatsoever. See, United States v. Brown, 983 F.2d 201

(11th Cir. 1993); United States v. Bailin, 977 F.2d 270 (7th Cir. 1992); United States v. Rogers, 960 F.2d 1501 (10th Cir. 1992); United States v. Seley, 957 F.2d 717 (9th Cir. 1992); Pettaway v. Plummer, 943 F.2d 1041 (9th Cir. 1991); United States v. Frazier, 880 F.2d 878 (6th Cir. 1989); United States v. Griggs, 651 F.2d 396 (5th Cir. 1981); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979). The court's language in Bailin, Id., at 279, is most instructive of the majority view. "The government cannot prevail with the ... argument that an acquittal on one count, coupled with a hung jury on a related count makes it impossible to determine that a jury necessarily established any common element of those two offenses. 'A hung jury is defined as a jury so irrevocably divided in opinion that it cannot agree upon any verdict by

the required unanimity,' Black's Law Dictionary 741 (6th ed. 1990), or as 'one that did not carry out the task assigned it.' Anne B. Polin, Collateral Estoppel in Criminal Cases, 58 Cinn. L. Rev. 1, 44 n. 12 (1989). Therefore, the 'jury's failure to reach a verdict [is] too inclusive to justify as inconsistent for the purposes of issue preclusion.' Id., The powerful Double Jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts." Id., at 280; citing, United States v. Seley, supra. Therefore, a conflict between the circuits exists as to what effect the fact of a hung jury has upon the application of the collateral estoppel rule under Ashe, supra. This Court is the only tribunal which can settle this dispute.

Furthermore, among the state courts

of last resort which have addressed Double Jeopardy and collateral estoppel in the context of the case at bar, majority and minority views also prevail. Ferrell v. State, 318 Md. 235, 567 A.2d 937 (1990) is representative of the majority view explained above. See Ferrell, supra, at 947. The minority position is represented by the holding in State v. Esposito, 148 N.J.Super. 102, 371 A.2d 1273 (1977). Therefore, by accepting the case at bar, the Court would achieve the dual purpose of also resolving the conflicting views of state appellate courts. Therefore, there would be uniformity among both the federal circuits and state tribunals. Thus, petitioner respectfully requests that this Court issue a writ of certiorari.

II.

IN THE ABSENCE OF GRADY V. CORBIN, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) CONFUSION EXISTS AS TO THE AMOUNT OF DOUBLE JEOPARDY PROTECTION AFFORDED CRIMINAL DEFENDANTS WHEN FACED WITH SUCCESSIVE PROSECUTIONS INVOLVING CONDUCT FOR WHICH THERE HAS BEEN A PREVIOUS ACQUITTAL.

Mr. Justice Souter, dissenting in Dixon, supra, at 113 S.Ct. 2891, remarked that "[o]verruling Grady alone cannot remove this principle (that the Double Jeopardy clause bars successive prosecutions for more than one statutory offense where the charges comprise the same act) from our Constitutional jurisprudence. Only by uprooting the entire sequence of cases, Grady, Vitale, Harris, and Nielsen, could this Constitutional principle be undone." In

light of the fact that this Court has let stand Vitale, Harris, Brown, and Nielsen, it is apparent that the Court did not intend, by overruling Grady, to completely disengage criminal defendants in subsequent prosecutions from the protection of having to re-litigate prior acquitted conduct. Furthermore, the case at bar is distinguishable from Dixon, supra. Dixon, Id., involved a contempt proceeding; the case at bar involved substantive offenses. Petitioner contends therefore, that different rules apply when determing whether to allow prior acquitted behavior to be the foundation of a future prosecution. Nevertheless, since Dixon, supra, is silent as to what Double Jeopardy rights remain with respect to prior acquitted conduct, and re-litigation of issues surrounding that conduct, the District of Columbia Circuit has simply

decided to opine that there is no protection whatsoever against re-litigation of prior acquitted conduct (App., infra, A-14 and 15). In the absence of clarification from this Court the other circuits will, no doubt, follow the path unconstitutionally skewed against the once acquitted criminal defendant. In light of the apparent incongruity between the circuit court's rationale and the precedent left intact by Vitale, Harris, Brown, and Nielsen, this Court is asked to make a specific pronouncement as to what protection, if any, is afforded a criminal defendant with respect to having to re-litigate prior acquitted conduct.

In the matter at hand, petitioner requested a special jury instruction to limit the scope and effect of his prior acquitted conduct (App., infra, K-2). Petitioner's request was denied (App.,

infra, L-3, thru L-6), in spite of the fact that the requested instruction was lifted almost verbatim from Dowling, supra. The circuit court made no pronouncement in its opinion (App., infra, A-2 thru A-17), as to the efficacy of petitioner's request; unless, *sub silentio*, the court rejected petitioner's claim (App., infra, H). Petitioner made the circuit court aware of the omission (App., infra, H & I). Nonethless, the circuit court refused to address the jury instruction issue. Thus, a further review by this Court is required to protect petitioner's constutional rights.

The Double Jeopardy clause prevents the government from making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing

state of anxiety and insecurity. The clause addresses a further concern as well, that the government not be given the opportunity to rehearse its prosecution, honing its trial strategy, and perfecting its evidence through successive attempts at conviction, because this enhances the possibility that even though innocent, the defendant may be found guilty. See, Dixon, supra, at 113 S.Ct. 2883, Mr. Justice Souter with Mr. Justice Stevens concurring in the dissent, citing, Green v. United States, 335 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Petitioner was subjected to the type of harm which the Double Jeopardy clause was enacted to protect. Petitioner's contention is bolstered by a review of the government's second trial rationale in opposing the petitioner's limiting jury instruction (App., infra, K-2). The

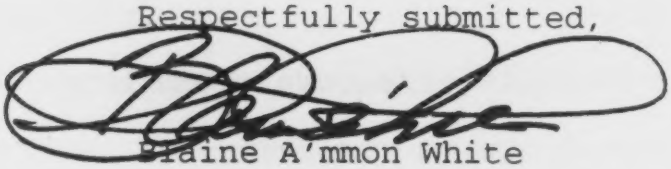
government's position was that it was "perfectly permissible" for the jury to infer guilt from the act of acquiring the Baldwin birth certificate. (App., infra, L-4). Furthermore, in the second trial summation, the government argued that the petitioner's knowledge of Linden's aliases was apparent from the application for the birth certificate (App., infra, L-10 thru L-11, and L-14 thru L-14). The aforegoing are all acts for which petitioner had been acquitted in the initial prosecution. Thus, petitioner's Double Jeopardy rights were violated.

Therefore, in the name of fundamental fairness, a further review of petitioner's conviction is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Pro Se

November 1993

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Blaine A'mmon White, Petitioner

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United States of America

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 14, 1993
Decided July 27, 1993

No. 92-3130

United States of America

v.

Blaine A'mmon White
Appellant

Appeal from the United States District Court for the District of Columbia

(90cr0427-01)

Blaine A'mmon White, pro se.

Valinda Jones, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney at the time the brief was filed, John R. Fisher and Eric A. Dubelier, Assistant United States Attorneys, were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motion to file bills of costs out of time.

[2] Before: Mikva, Chief Judge, Silberman and Randolph, Circuit Judges.

Opinion for the Court filed by Circuit Judge Silberman.

Silberman, Circuit Judge: Appellant claims that his convictions for passport fraud and for aiding and abetting passport fraud violated the Double Jeopardy Clause. He also raises a number of challenges to his sentence under the Sentencing Guidelines. We affirm the convictions and reject appellant's objections to his sentence.

I.

The facts are essentially undisputed. Acting on behalf of a client on November 1, 1989, Blaine White, who is an attorney,

obtained a birth certificate from the Maryland vital records office bearing the name William S. Baldwin. Subsequently, on November 13, he signed an affidavit in support of the same client's application for a United States passport. White swore that he had known the applicant for five years, that he knew the applicant was a United States citizen, and that the applicant's name was William S. Baldwin. The birth certificate was used as proof of identity in the passport application.

Appellant was originally charged in a two-count indictment with document fraud, 18 U.S.C. § 1028(a)(4), and passport fraud, 18 U.S.C. §1542. Section 1028(a)(4) makes it a crime to "knowingly possess [] an identification document (other than one issued lawfully for the use of the possessor) or a false identification document, with the intent

such document be used to defraud the United States," and section 1542 makes it unlawful to "willfully and knowingly make[e] any false statement in an application for [a] passport."

The government attempted to establish that White had been involved in a scheme to obtain false identification documents for a Canadian citizen, Harold D. Linden, a/k/a/ Norman Harold Moore, who was residing in this country illegally and who had retained White as an attorney. The real William S. Baldwin had died two days before White applied for the birth certificate (his obituary appeared in the newspa[3]per on October 31) and the government sought to prove that White knew he was obtaining the dead man's birth record. An official from the vital records office testified that White received the birth certificate under a

special procedure that the office used to allow attorneys to obtain the records of deceased persons. Had Baldwin still been alive, White could not have obtained the certificate without notarized authorization from Baldwin himself. White testified, however, that his client, the individual identified at trial as Harold Linden, had always been known to him as William Baldwin, and that he had no idea that there was any special procedure used in issuing deceased persons' records. Thus, White claimed that he had no idea that he was acquiring a dead person's birth certificate and asserted that the affidavit he signed at the passport office was true to the best of his knowledge.

The jury acquitted White of document fraud under section 1028(a)(4), but could not reach a verdict on the passport charge. The district judge declared a

mistrial on the latter count and dismissed the charge without prejudice.

White was subsequently reindicted on a five count indictment that charged, among other crimes, making false statements in an affidavit accompanying a passport application, 18 U.S.C. § 1542 (Count IV)(this was the same charge which there had been a hung jury in the first trial) and aiding and abetting Linden in making false statements in a passport application "by supplying Linden with false name, William Smith Baldwin, and false Social Security number" (Count V). According to the government, appellant not only provided Linden with a birth certificate, but also copied a Social Security number from a client's file in his law firm and gave the number to Linden to use on the passport application. Appellant moved to dismiss the charges on

Double Jeopardy grounds. According to appellant, the jury in the first trial conclusively determined that he did not know that Linden was not William Baldwin. Any subsequent prosecution that would call into question that jury determination would be barred by the collateral estoppel component of the Double Jeopardy protection. See Ashe v. Swenson, 397 U.S. 436 (1970). Appellant also contended that under Grady v. Corbin,[4] 495 U.S. 508 (1990), evidence of his conduct in obtaining the birth certificate could not be used in any subsequent prosecution because he had already been acquitted on the document fraud count.

The district court denied appellant's motion, see United States v. White, 757 F. Supp. 45 (D.D.C. 1990), and appellant brought an interlocutory appeal. We rejected appellant's collateral estoppel

argument and held that the jury's verdict in the first trial did not conclusively determine the issue of appellant's knowledge. See United States v. White, 936 F.2d 1326, 1329 (D.C. Cir.) (White I), cert. denied, 112 S. Ct. 381 (1991). We reasoned that, had the jury actually concluded that appellant did not know of Linden's double identity, it would also have acquitted appellant on the passport charge. See id. In that interlocutory appeal, we did not reach the question whether Grady v. Corbin barred prosecution of Count V (aiding and abetting passport fraud), because the government agreed to limit its use of the evidence concerning the acquisition of the birth certificate. See id. at 1330. The government conceded that it could not "prove either the conduct of unlawfully procuring the birth certificate from the vital records office

with intent to defraud the U.S. at the time, or of unlawfully possessing it with such intent at the passport office, as an essential element of the offenses charged in the second indictment." Id., at 1330 n.2.

In the second trial, the government reintroduced part of the evidence it had used in the first trial relating to the document fraud charge. The jury convicted on both Counts IV and V but acquitted appellant on all other counts.

II.

A.

Appellant relies exclusively on the Supreme Court's decisions in Grady v. Corbin, 495 U.S. 508 (1990), to argue that in his second trial the government violated the Double Jeopardy Clause, see U.S. Const., Amend. 5 ("[N]or shall any person be subject for the same offense to

be twice put in jeopardy of life [5] or limb."), by prosecuting him for the same offense of which he was acquitted in the first trial. But Grady has been overruled, see United States v. Dixon, 61 U.S.L.W. 4835 (U.S. June 28, 1993), and the Supreme Court has made clear that the so-called Blockburger test is the sole test for determining whether the crimes charged in successive prosecutions are the "same offense" for double jeopardy purposes. See id. at 4839; see also Blockburger v. United States, 284 U.S. 299 (1932). The Blockburger analysis focuses strictly on the statutory elements of crimes: two offenses are not the same as long as each requires proof of an element the other does not. See Blockburger, 284 U.S. at 304.

There can be little doubt that document fraud under 18 U.S.C. §1028(a)(4)

is not the same offense as either passport fraud or aiding and abetting passport fraud under 18 U.S.C. §§ 1542 & 2. Under section 1028 the government must prove that the accused (i) knowingly possessed an identification document, (ii) that was not lawfully issued for his use, (iii) with the intent to defraud the United States. Passport fraud, in contrast, requires proof that the accused (i) willfully and knowingly make false statement in a passport application, (ii) with the intent to secure issuance of a United States passport contrary to the laws and regulations governing the issuance of passports. Even if we were to assume, arguendo, that the nature of the intent required in each crime was essentially the same, each statute still requires proof of an element the other does not. Document fraud under section

1028 requires possession of an identification document, while passport fraud under the section 1542 requires proof that the accused made a false statement in a passport application. The elements could hardly be more distinct. And, of course, aiding and abetting passport fraud must, a fortiori require proof of an element that document fraud does not, because the government must prove both that someone committed the principal offense, see e.g., United States v. Raper, 676 F.2d 841, 849 (D.C. Cir. 1982), and that the accused aided and abetted commission of the crime. Thus, the government must prove the same elements of passport fraud -- which, as we have already noted, are different from those for the [6] offense of identification document crime described in section 1028 -- and then must prove aiding

and abetting. Even if the government sought to prove aiding and abetting by referring to exactly the same conduct that it previously had attempted to use to prove document fraud-- that is, if the government sought to prove aiding and abetting by the very act of acquiring the dead man's birth certificate -- it would not offend the Double Jeopardy Clause. The same actions can constitute an offense under two distinct statutes and can be prosecuted separately under each as long as the statutes do not define a single offense under Blockburger. See Blockburger, 284 U.S. at 304 (quoting Morey v. Commonwealth, 108 Mass. 433(1871)).

In short, sans Grady, which directed Double Jeopardy analysis to the government's reproof of the same conduct, appellant is left without support for his

Double Jeopardy claim. The prosecutions for passport fraud and aiding and abetting passport fraud therefore do not violate appellant's rights under the Double Jeopardy Clause.[1]

B.

Appellant claims that the evidence was insufficient to support his conviction for passport fraud. Appellant raises this argument for the first time on appeal --

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[1] Appellant asks us to revisit the question he presented on interlocutory appeal concerning the collateral estoppel effects of his acquittal. According to appellant, the jury in the first trial decided that he did not know that his client was not William Baldwin. We have already held, however, that the jury in the first trial did not conclusively determine that appellant did not know Linden's true identity. See White I, 936 F.2d at 1329. That holding is the law of the case, and there is no reason for us to disturb it. See Lever Bros. Co. v. United States, 981 F.2d 1330, 1332 (D.C. Cir. 1993) (Court must follow law of the case unless convinced that prior decision was erroneous and that adherence to the decision would work a grave injustice).

he moved for judgement of acquittal on only one count of the indictment, a conspiracy charge on which he was acquitted. We therefore review the challenge to the sufficiency of the evidence only [**7**] for plain error. See United States v. Sayan, 968 F.2d 55, 62 (D.C. Cir. 1992). We admit we are not sure exactly what standard is implied by plain error review on a sufficiency of the evidence challenge. Presumably review should be more deferential than under the usual standard under which we determine only "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). But it is hard to imagine that more deferential

standard. The Jackson standard already suggests that we would only reverse for an error that was "plain" (in the sense of "obvious") and requires, by definition, that the error prejudice substantial rights.

We need not decide exactly how plain error review might modify the standard in this context, however, because even under the Jackson standard, there was sufficient evidence to support a conviction. We must, of course, in applying Jackson "consider the evidence in the light most favorable to the Government," United States v. Jefferson, 974 F.2d 201, 205 (D.C. Cir. 1992), and allow the government "the benefit of all reasonable inferences that may be drawn from the evidence," United States v. Sutton, 801 F.2d 1346, 1358 (D.C.Cir. 1986). Appellant admitted signing the affidavit; thus, the

government needed to prove only that he intended to help Linden secure a passport. Se 18 U.S.C. §1542(a). . The government presented ample evidence concerning Linden's aliases and White's knowledge of them--including evidence that White wired Linden under the name Norman Moore and testimony suggesting that White knew he was obtaining a dead man's birth certificate--for a reasonable jury to conclude that White knowingly signed a false affidavit and intended to help Linden obtain a passport.

C.

Appellant raises a number of challenges to his sentence. White first contends that the court erred in denying him a [**8**] three-level reduction pursuant to section 2L2.3 of the Sentencing Guideline for committing the passport offense "other than for profit." U.S.S.G

§ 2L2.3. The district judge denied the reduction based on a finding that White was paid for helping Linden in his passport fraud scheme. Fact-findings in a sentencing context need be supported only by a preponderance of the evidence, see United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989), and "we will 'uphold the district court's sentence so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous.'" United States v. Barry, 938 F.2d 1327, 1332 (D.C. Cir. 1991) (quoting United States v. Young, 932 F.2d 1510, 1512 (D.C. Cir. 1991)).

Here, we do not think the district judge erred at all. The government introduced evidence at the trial and at sentencing to show that White had established a trust account for Linden and

that both on November 1 (the same day that he obtained the birth certificate) and on November 3, White drew checks on the account, made out to "cash," for $2,600 and $2,000, respectively. The $2,600 check bore the notation "Documents of identification per client," and the other check had the notation "I.D. per client." White contended that he gave this money to Linden but produced no evidence supporting that claim, and Linden denied receiving the funds. The defendant "properly bears the burden of proof under those sections of the Guidelines that define mitigating factors," Burke, 888 F.2d at 869 n.10, and thus appellant had the burden of proving that he did not assist Linden for Profit. The district judge reasonably concluded that the checks were payment to White for his role in obtaining the birth

certificate and subsequently the passport.[2]

[9] Appellant also challenges the two-level enhancement he received under section 3C1.1 for obstruction of justice. The district judge based the enhancement on a finding that White committed perjury in his trial testimony. See U.S.S.G. § 3C1.1 Application Note 3(b) (listing perjury as an example of the type of conduct to which the enhancement applies). White testified that he honestly believed that Linden was in reality William Smith Baldwin. The jury, however, found White guilty beyond a reasonable doubt of knowingly signing a false affidavit. The

[2] We need not decide whether, as the trial judge appeared to suggest, appellant's position as attorney for Linden (he was presumably being paid for his services) would have been sufficient to show that he committed the crime for profit absent some more direct evidence of payment for his particular role in the criminal enterprise.

verdict virtually made it a foregone conclusion that a district judge would conclude by a preponderance of the evidence that White testified falsely when he stated that he thought that Linden was Baldwin. We certainly cannot say that it was clear error for the district judge to reach that conclusion. Nor can we find any error in the district judge's implicit decision that, in a case in which the question was so clearly and starkly posed, White testified willfully, not merely as a result of confusion or faulty memory. See United States v. Thompson, 962 F.2d 1069, 1071 (D.C.Cir. 1992).

Appellant contends that he should not have received a sentencing enhancement pursuant to section 3B1.3 for abuse of a position of trust or for use of a special skill. The district judge based the enhancement in part on White's use of his

skill as a lawyer to facilitate the commission of the crime, and in part on his abuse of trust in stealing a client's Social Security number from his law firm's files. Application Note 2 to section 3B1.3 explicitly includes lawyers as examples of individuals who possess the "special skill" referred to in the Guideline. By setting up a trust account, which he later used to pay himself for his own part in the scheme, White used his skill to further the crime in this case. The sentencing court also properly relied on White's use of his special skill in obtaining the birth record of a dead man. Ordinary members of the public not known to officials in the records office as attorneys would not have been able to acquire the same certificate.

Although White's use of his special skill sufficed in itself to justify the

enhancement, the district court also considered his [**10**] abuse of a position of trust. The court determined by a preponderance of the evidence that White provided Linden with a Social Security number from his firm's client files. Although appellant claimed that Linden had unsupervised access to the files and could have obtained the Social Security number himself, we cannot say that the court's findings was clearly erroneous. Providing Linden with the information clearly abused a position of trust within the meaning of the Guideline. The relationship between a client and an attorney (and the attorney's firm) is such that all attorneys at a firm must be presumed to be in a "position of trust" with respect to the firm's clients. Cf. United States v. Polland, No. 92-1702, 1993 U.S. App. LEXIS 12792, at *20 (7th Cir. May 28, 1993) (holding that attorney-

client relationship can place attorney in position of trust for purposes of section 3B1.3).

D.

Appellant's last argument is that the government violated its pledge not to introduce evidence concerning the acquisition of the birth certificate. Appellant essentially presses an estoppel theory, by which he contends that if the government used evidence that it had promised not to introduce, his conviction cannot stand. We need not decide the merits of appellant's theory, however, because the government did not violate its pledge. The government carefully qualified its concession and promised only that it would not "prove either the conduct of unlawfully procuring the birth certificate from the vital records office with intent to defraud the United States

at that time, or of unlawfully possessing it with such intent at the passport office, as an essential element of the offenses charged in the second indictment." White I, 936 F.2d at 1330 n.2 (emphasis added). The government, of course, tailored its concession to its understanding of what the now overruled Grady decision required. It is true that in White I we said that we would not decide whether (or to what extent) Grady would prohibit reproof of the conduct surrounding the acquisition of the birth certificate "because the government has conceded ... that it may not reprove the conduct involving the birth certificate offense,: Id., at 1330, **[11]** and that statement could be read to reflect a broad understanding of the concession. Still, our description of the government's promise was ambiguous at best and was not

intended to provide a definitive interpretation for the government to follow. The government proceeded in good faith on its own narrower understanding of the concession, an understanding that it maintained consistently before the district court. The district judge even approved the government's position outlining how it intended to implement the concession. There was, therefore, no violation of the promise in this case.

* * * * *

For the foregoing reasons, appellant's convictions and sentences are affirmed.

so ordered.

UNITED STATES of America, Appellee

v.

Blaine A. White, Appellant.
No. 91-3021.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 2, 1991.

Decided June 28, 1991.

Defendant appealed from order of the United States District Court for the District of Columbia, Thomas F. Hogan, J., 757 F. Supp. 45, which denied motion to dismiss indictment on double Jeopardy ground. The Court of Appeals, Henderson, Circuit Judge, held that acquittal on one count in first indictment did not preclude prosecution of second indictment involving related charges.

Affirmed.

1. Double Jeopardy #3

Double jeopardy clause incorporates the doctrine of collateral estoppel.

U.S.C.A. Const.Amend.5.

2. Judgement # 751(1)

Court examines the instructions and other relevant material to decide whether the jury must indeed have determined in the prior trial the issue which defendant seeks to foreclose from further litigation. U.S.C.A. Const.Amend.5.

3. Judgement #751

Fact that jury at first trial acquitted defendant of possessing an unlawfully issued birth certificate with intent to defraud the United State did not show that it found that he lacked the necessary knowledge or intent and thus that he believed his client to be the person named in the birth certificate, and thus did not collaterally estop the Government from second prosecution based on defendant's knowledge that the client was not the person named; if jury had

actually found that defendant believed the client was not the person named, it would also have acquitted him of second charge, whereas it did not. U.S.C.A. Const.Amend.5.

4. Double Jeopardy #81

Double Jeopardy does not bar from subsequent prosecutions all evidence which the government has introduced in an earlier prosecution against the same defendant. U.S.C.A. Const.Amend.5.

5. Double Jeopardy #98

With respect to count on which jury reached no verdict, the defendant was in continuing jeopardy and double jeopardy clause did not bar subsequent indictment for the same offense. U.S.C.A. Const.Amend.5.

6. Double Jeopardy #8

Charge which appeared for the first time in second indictment, following

first trial which resulted in one acquittal and one charge on which the jury could not reach a verdict, was not barred by double jeopardy. U.S.C.A. Const.Amend.5.

Appeal from the United States District Court for the District of Columbia (Criminal No. 90-00427-01).

James Benny Jones for Appellant.

Barry Wiegand, Asst. US Atty., with whom Jay B. Stephens, US Atty., and John R, Fisher and Thomas J. Tourish, Jr., Asst. US Atty., were on the brief, for appellee.

Roy W. McLeese, Asst. US Atty., also entered an appearance, for appellee.

Before EDWARDS, SENTELLE and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

HENDERSON, Circuit Judge.

I.

Beginning on June 28, 1990, Blaine White was tried in the District Court on a two-count indictment. Count I alleged that the defendant possessed an unlawfully issued birth certificate with the intent to defraud the United States in Violation of 18 U.S.C. §§ 1028(a)(4) & 2. Count II alleged that he made false statements in an application for a United States passport in violation of 18 U.S.C. §§ 1542 & 2. At trial, the government presented evidence showing that the defendant was the lawyer for Harold Linden, a Canadian Citizen. On November 1, 1989, through false representations to the Maryland Division of Vital Records, the defendant

obtained a certified copy of a birth certificate bearing the name William Baldwin. The defendant provided Linden with the birth certificate and also with a fake social security number. On November 13, 1989, the defendant and Linden appeared before a passport agent at the U.S. State Department. Linden applied for a U.S.passport in the name of William Smith Baldwin; as proof of his identity, he offered the birth certificate in the name that the defendant had earlier obtained. On the passport application, Linden also used the fake social security number he had received from the defendant. In support of Linden's false passport application, the defendant signed an affidavit identifying the applicant as Baldwin and swearing that he had known the applicant for five years. And as result of this application, Linden obtained a

U.S. Passport in the name of William Baldwin. Linden was later arrested, he possessed both the U.S. Passport in the name of William Baldwin and a British passport, also with his picture on it, in the name of Norman Moore.

The trial judge charged that the jury that it could convict on Count I of the indictment only if it found that the defendant possessed an identification document other than one issued lawfully for use by him; that he acted willfully; and that he intended to use the document to defraud the United States. To convict on Count II, the court charged the jury it must find that he acted wilfully; and that he intended to secure the issuance of a passport. The jury acquitted the defendant on Count I(the birth certificate count) and was unable to reach a verdict on Count II (the Passport count). The

district court granted a mistrial on Count II and dismissed it without prejudice on July 25, 1990.

On October 9, 1990, the government filed a second indictment charging the defendant and a co-defendant with offenses arising out of the same course of events. Count I of this indictment alleged as a violation of 18 U.S.A. § 371 the defendant's participation in a conspiracy to provide Linden with a fake British passport in the name of Norman Moore; to fraudulently obtain a U.S. Immigration and Naturalization Service form I-94 in the name of Norman Moore; to make false statements in an application for a U.S. passport in the name of William Baldwin; and to shield from detection Linden, who remained in the country as an illegal alien.1 Count III alleged that, in violation of 8 U.S.C. § 1324(a)(1)(c) and

18 U.S.C. § 2, the defendant shielded from detection Linden who was in the country as an illegal alien. Count IV essentially restated Count II of the earlier indictment, charging the defendant with knowingly making false statements in a passport application to secure issuance of a passport. Count V charged the defendant with aiding and abetting Linden in making false statements in a passport application in violation of 18 U.S.C. §§ 1542 & 2.[1]

In the district court, the defendant sought dismissal of the second indictment on two grounds. First, he argued that, in order to acquit him on Count I of the first Indictment (White I), the jury must have found that he did not act wilfully. He contended that collateral estoppel precluded the government from retrying

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[1] Count II of the second indictment charged only the co-defendant.

under the second indictment (White II) the issue of his intent when he committed the acts in question. He also argued that the amendment's double jeopardy clause prohibited the government from introducing in the second trial any evidence it had used in the trial on the count of which he was acquitted in White I. The district court rejected both arguments, holding that the government could proceed with the prosecution of the second indictment. See United States v. White, 757 F.Supp. 45 (D.D.C. 1990). Seeking review of the district court's ruling, the defendant brought this interlocutory appeal. See Abney v. United States, 431 U.S. 651, 657-62, 97 S.Ct. 2034, 2039-41, 52 L.Ed.2d 651 (1977).

II.

[1] The double jeopardy clause incorporates the doctrine of collateral

estoppel. Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 671, 107 L.Ed.2d 708 (1990);see also United States v. Bowman, 609 F.2d 12, 17 (D.C.Cir.1979).

> "Collateral estoppel" . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same two parties in any future lawsuit. . . .
>
> . . . Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a

> rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

Ashe v. Swenson, 397 US 436, 443-44, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970) (footnote and internal quotation omitted). When the defendant seeks to invoke collateral estoppel, the burden is on him to "Demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding:. Dowling, 110 S.Ct. at 673.

At trial, because the defendant did not deny committing the acts charged, the government stated at the close of its

evidence that "the issue only [sic] is the intent of the defendant at the time he performed the acts." The appellant grounds his collateral estoppel argument on this statement, contending that, in acquitting him of the birth certificate count, the jury must have found that he lacked what he refers to as "knowledge/intent."

Under the appellant's argument, the acquittal represents a jury finding that his motives in connection with the possession of the birth certificate were entirely pure. He reads the acquittal as conclusively establishing both that he believed Linden to be Baldwin (and therefore did not act wilfully in illegally possessing the birth certificate bearing Baldwin's name) and that he did not intend to use the document to defraud

the United States. He argues that the first verdict creates a collateral estoppel bar to the second prosecution: once the jury determined he was unaware of Linden's true Identity, he asserts, the government could not relitigate this issue as it would have to in the second prosecution.

[2,3] We do not read the implications of the appellant's acquittal so broadly. As the Court directed in Ashe, we examine the "charge and other relevant material," 397 US at 444, 90 S.Ct. at 1194, to decide whether the jury must indeed have determined the issue the appellant seeks to foreclose from further litigation. This leads us to reject the appellant's broad collateral estoppel argument. Had the jury found, as the appellant contends, that he actually believed Linden to be William Baldwin, it would have acquitted

him on the second count as well as the first. The finding that the defendant believed Linden to be Baldwin would have extended to and controlled the verdict on the second count and the jury could have found that the defendant did not wilfully make a false statement in the passport application. Since the jury reached no verdict on the passport count, it must have based the Count I acquittal on a finding other than that which the appellant urges. CF> United States v. Scott, 464 F.2d 832, 833 (D.C. Cir. 1972) (where jury acquitted defendant of armed robbery but reached no verdict on unarmed robbery, it did not necessarily find that the defendant was not a robber because that finding would have compelled acquittal of unarmed robbery as well; second trial for unarmed robbery not barred).

Accepting the appellant's argument would require us to assume that the jury acted inconsistently, reaching opposite findings on the same issue in the different counts. Because we are loath to impute such inconsistency to the jury, CF, United States v. Powell, 469 US 57, 68, 105 S.Ct. 471, 478, 83 L.Ed.2d 461(1984) (nothing "assumption that the jury acted rationally"), we hold the appellant has failed to carry the burden Dowling places on him to establish that the issue he seeks to foreclose was in fact determined in the first trial. See 110 S. Ct. at 673. Collateral estoppel does not bar the relitigation, under the second indictment, of the appellant's knowledge of Linden's true identity.

III.

[4] The appellant next makes a series of arguments based on double jeopardy

clause. First, he attempts to pull from the double jeopardy clause a "same evidence" component that would bar from subsequent prosecutions all evidence the government has introduced in an earlier prosecution against the same defendant. In Grady v. Corbin, ---- U.S.-----, 110 S.Ct. 2084, 2093, & n. 12, 109 L.Ed.2d 548 (1990), the Supreme Court rejected this argument, stating that, for the purpose of double jeopardy, "[t]he critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Accordingly, the exclusion from the second trial of all evidence introduced in the first one fails.

[5] Next, the appellant asserts that, to the extent the second indictment charges crimes for which he stood trial under the first indictment, the double jeopardy clause bars prosecution of the

second indictment. First, this argument fails with respect to the count on which the first jury reached no verdict because, for the conduct charged therein, the appellant is in continuing jeopardy. See Richardson v. United States, 468 US 317, 326, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984) ("a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which the petitioner was subjected"). Nothing prevents the government from retrying the appellant in connection with the conduct charged in the passport count of the first indictment: "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Id., at 324, 104 S.Ct. at 3805 (citing Logan v, US, 144 US 263, 297-98, 12S.Ct. 617, 627-28, 36 L.Ed. 429 (1892)). Since Count IV of the second indictment merely restates

the charge in the passport count of the first indictment, prosecution of this does not offend the double jeopardy clause.

[6] The double jeopardy clause also offers no help to the defendant in his attack on Count III of the White II indictment. That count alleges that he knowingly harbored an illegal alien. This charge appeared for the first time in the second indictment and is unconnected with the White allegations. It poses no double jeopardy problems.

With respect to the remainder of the second indictment, Count I and V, the appellant asserts that the Supreme Court's holding in Grady v. Corbin, ---- US ------ , 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), bars a second trial because, in connection with these counts, the government would reprove conduct for which the appellant was prosecuted under the first indictment.

In Grady, the Court stated:

> [T]he double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense for which the defendant has already been prosecuted.

Id., 110 S.Ct. at 2093. Wee need not reach this argument because the government has conceded, both before the district court, see 757 F.Supp. at 49-50, and in this court, that it may not reprove the conduct involving the birth certificate offense unsuccessfully prosecuted under the first indictment. See Government Brief at 32.[2]

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[2] The government concedes that it "cannot prove either the conduct of unlawfully procuring the birth certificate from the vital records office with intent to defraud the US at that time, or of unlawfully possessing it with such intent at the passport office, as an essential element of the offenses charged in the

We note that the government's concession limits it only slightly in the prosecution of Counts I and V. The government may still prove the defendant's conduct, for which he was not prosecuted in the first trial, of providing Linden with fake social security number to use ont the passport application. It may also reprove the defendant's sworn statement -- as to which he is in continuing jeopardy -- that he had known Linden as William Baldwin for five years.

IV.

The appellant's collateral estoppel argument lacks merit and we affirm the portion of the district court's order rejecting it. Because the government agrees that it may not reprove the White I birth certificate offense at the second

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second indictment." Government Brief at 32.

trial, we also affirm that portion of the district court's order rejecting the appellant's double jeopardy challenge to the second prosecution.

So ordered.

UNITED STATES OF AMERICA
V.
BLAINE A. WHITE, DEFENDANT.

Cr. A. No. 90-427.

United States District Court,
District of Columbia.

Dec. 20, 1990.

After being acquitted in earlier prosecution of knowingly possessing birth certificate with intent to defraud, defendant was indicted for making false statements, and he moved to dismiss on Double Jeopardy grounds. The District Court, Thomas F. Hogan, J., held that: (1) retrial of defendant on charge of making false statements on a passport application did not violate Double Jeopardy where mistrial was due to deadlocked jury; (2) defendant's

acquittal on charge of knowingly possessing birth certificate with intent to defraud did not collaterally estop Government from retrying issue of defendant's intent on false statements charge; and (3) while prosecution was precluded from introducing evidence concerning defendant's possession of birth certificate, it was not precluded from introducing evidence concerning acquisition and later transfer of birth certificate.

Motion to dismiss denied.

1. Double Jeopardy 98

New trial following mistrial which result from deadlocked jury does not violate double jeopardy clause. U.S.C.A. Const.Amend. 5.

2. Judgement 751, 956(1)

In order to determine whether collateral estoppel applies in criminal

case, court examines record in prior proceeding to determine whether rational jury could have grounded its verdict on issue other than that which defendant is seeking to foreclose; defendant carries burden of proving that previous jury necessarily decided issue that he seeks to foreclose in his favor. U.S.C.A. Const.Amend.5.

3. Judgement 751

Defendant's acquittal on charge of knowingly possessing birth certificate with intent document be used to defraud United States did not collaterally estop Government from retrying issue of defendant's intent on false statements charge; issues other than issue of intent could have accounted for acquittal. 18 U.S.C.A. §§ 1028(a)(4), 1542.

4. Double Jeopardy 136

Test for determining whether

successive prosecutions involve same offense focuses on proof actually used to establish charge and not on formal elements of alleged identical offenses so that second prosecution is barred by double jeopardy if evidence actually used to prosecute first offense would have convicted in second offense as charged. U.S.C.A. Const.Amend.5.

5. Double Jeopardy 139

Evidence to be presented at defendant's trial passport for fraud and making false statements would include testimony of defendant's former codefendant and thus could not present same evidence as in first indictment, so that no violation of double jeopardy occurred; second indictment did not charge defendant with same conduct as first prosecution. U.S.C.A. Const.Amend. 5.

6. Double Jeopardy 136

Presentation of same evidence in second prosecution as in first does not automatically result in double jeopardy. U.S.C.A. Const.Amend. 5.

7. Double Jeopardy 102

Defendant's acquittal in earlier prosecution of possessing birth certificate with intent to use document to defraud Government did not preclude Government from introducing evidence in later prosecution for passport fraud and making false statements concerning acquisition and subsequent transfer of birth certificate. U.S.C.A. Const.Amend. 5.

James Benny Jones, Washington, D.C., for defendant.

[Page 46 757 Federal Supplement]

Eric DuBelier, U.S. Attorney's Office, Washington, D.C., for plaintiff.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

After a hearing on December 11, 1990, this Court denied defendant's Motion to Dismiss on Counts I, II, III, IV, and V, of the indictment. For the reasons stated in open court on December 11, 1990, and for the reasons stated below, the Court shall deny defendant's motion to dismiss. This memorandum opinion supports the Court's order issued from the bench on December 11, 1990.

FACTUAL BACKGROUND

On or about March 19, 1990, the defendant was indicted in Criminal no. 90-129 (hereinafter, "White I"). The two-count indictment charged the defendant and a co-defendant, Harold Linden, with knowingly possessing a birth certificate in the name of William Smith Baldwin with the intent that such document be used to

defraud the United States in violation of 18 U.S.C. §§ 1028(a)(4) and 2 (Count I), and with the making of false statements in an application for a passport for use by Harold Linden in violation of 18 U.S.C. § 1542 (Count II).

As to Count I (the "birth certificate charge"), the Court charged the jury that to convict the defendant, the government had to prove beyond a reasonable doubt that the defendant possessed an identification document other than one issued lawfully for use by him, that the defendant intended to use the document to defraud the United States, and that the defendant acted willfully.

As to Count II (the "passport charge"), the jury was instructed that the government had to prove beyond a reasonable doubt that the defendant made a false statement in a passport application,

that the defendant intended to secure the issuance of a passport, and that the defendant acted willfully and knowingly.

The defendant was acquitted on Count I and there was a hung jury on Count II. The Court subsequently granted a mistrial and, on July 25, 1990, dismissed Count II without prejudice.

On or about October 9, 1990, the defendant was charged in a five-count indictment in this case (hereinafter, "White II").

In Count I, the indictment charged that the defendant conspired with defendant Weyforth, Harold Linden and others (1) to furnish Linden with a false British Passport in the name Norman Harold Moore for use to enter the U.S., (2) to obtain by fraud, for use by Linden, an I.N.S. Service Form I-94 in the name of Norman Moore, (3) to make false statements in an

application for a U.S. passport for Linden, an alien, in the name of William Smith Baldwin, and (4) to conceal, harbor, and shield from detection Linden, an alien who had come to, entered, and remained in the U.S. in violation of law, in violation of 18 U.S.C. §1543, 18 U.S.C. § 1546, 18 U.S.C. § 1542, 8 U.S.C. § 1324(a)(1)(C) and 18 U.S.C. § 371.

In Count III, the indictment charged the defendant and his co-defendant, Thomas G. Weyforth, with knowingly and in reckless disregard of the fact that Linden, an alien, had come to, entered, and remained in the U.S. in violation of the law, concealing, harboring and shielding Linden from detection, in violation of 8 U.S.C. § 1324(a)(1)(C) and 18 U.S.C. § 2.

In Count IV, the indictment charged the defendant with willfully and knowingly making false statements in a passport

application with the intent to secure the issuance of a U.S. passport for the Use of Linden by stating in the said application that he had known the applicant for five years and that the applicant was not a citizen or national of the U.S., in violation of 18 U.S.C. § 1542.

In Count V, the indictment charged the defendant with willfully and knowingly aiding and abetting Linden to make false statements in a passport application, with [Page 47 US v. White Cite as 757 F. Supp. 45 (D.D.C. 1990)] the intent to induce and secure the issuance of a U.S. passport, by providing Linden with the name "William Smith Baldwin" and the social security number 230-96-0467 to be placed on a passport application when the defendant and Linden knew that the name and social security number were not that of Linden, in violation of 18 U.S.C. § 1542 and 18

U.S.C. § 2.

The defendant now moves to dismiss Counts I, III, IV and V based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and on the incorporated principal of collateral estoppel. In the alternative, he seeks to order preventing the government from presenting any of the evidence presented in White I in this case.

ANALYSIS

The Double Jeopardy Clause of the Fifth Amendment states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[1] The Supreme Court has consistently adhered to the rule that a retrial following a mistrial because of a deadlocked jury does not violate the Double Jeopardy Clause. Richardson v.

U.S., 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d.242 (1984). See also United States v. Reis, 788 F.2d 54, 56 (1st Cir. 1986). Therefore, retrial on Count II of White is not barred by double jeopardy. The government may, again, prosecute the defendant for the alleged passport fraud.

The defendant alleges that prosecution in White II would subject him to double jeopardy since the government, according to the defendant, is charging the same offenses of which he was acquitted in White I. The defendant argues that the same evidence will be used in this second prosecution and that the government will again focus on the defendant's "intent" when he committed the acts in question. The defendant argues that the government is precluded from litigating the issue of intent again since the defendant was

necessarily acquitted in White I when the government was unable to prove beyond a reasonable doubt that the defendant knew that Mr. Linden was not, in fact William Smith Baldwin.

[2] Subsumed in the prohibition on double jeopardy is the application of collateral estoppel. In Ashe V. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970), the Court held that collateral estoppel was part of the Fifth Amendment's guarantee against double jeopardy. The Court explained the concept of collateral estoppel as follows:

It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit. Id., at 443, 90 S.Ct. at 1194. In order to apply these collateral estoppel principles in

criminal cases, the court must examine the record of the prior proceeding and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant is seeking to foreclose from consideration. The defendant carries the burden of proving that the previous jury necessarily decided the issue that he seeks to foreclose in his favor. See Dowling v. U.S., 493 U.S. 342, 110 S.Ct. 668, 673, 107 L.Ed.2d 708 (1990).

[3] When there is more than one possible reason for the first jury's verdict, and the court cannot say for certain which reason the jury grounded its verdict upon, a second prosecution using evidence of actions upon which the defendant has been acquitted is not prohibited. U.S. v. Irwin, 787 F.2d 1506, 1515-16 (11th Cir.1986).

In his effort to meet his burden, the defendant here points to the government's statement at the close of the government's evidence in White I where the government indicated that since there was no dispute concerning the actual acts charged, "the issue only [sic] is the intent of the defendant at the time he performed the acts." The defendant contends that this narrowing of the disputed issue and the fact that the jury acquitted the defendant on Count I in White I necessarily indicates that the jury found that the defendant did not have the requisite level of culpability when he [Page 48] possessed a birth certificate in the name of William Smith Baldwin. The defendant contends that, when the prosecutor made those remarks, the government was conceding that the only issue remaining for the jury was whether the defendant knew that the

individual with whom he was dealing was not, in fact, William Smith Baldwin, but Harold Linden.

The government objects to the defendant's broad definition of what constitutes "intent" which essentially encompasses knowing whether Linden was, in fact, Baldwin, and argues that if the issue of intent were as broad as the defendant alleges, the defendant would have been acquitted of Count II as well. Both counts required proof that the defendant knew that Mr. Linden was not William Smith Baldwin.

This Court agrees with the government on this second point. The defendant's definition of "intent" or "knowledge" could have precluded an acquittal on both counts in White I. The fact that the jury did not acquit the defendant on Count II suggests that the defendant's knowledge of

Mr. Linden's identity was not the only issue remaining for the jury's determination. Furthermore, this Court does not consider itself bound by the prosecutor's statements concerning what the government considers to be the outstanding issues for jury determination. The instructions to the jury did not instruct them that any material facts were already decided. Therefore, the Court must review the jury's verdict to determine if there is any basis, other than the one advanced by the defendant, which would stand as a basis for the jury's acquittal on Count I in White I.

There are several possible issues upon which the jury may have based its verdict. The jury could have found that the defendant possessed the birth certificate on November 1, 1989, but did not have the intent to defraud the United States at

that time. Similarly, the jury could have found that White had the requisite intent on November 13, 1989, but did not possess the birth certificate on that date.[1]

Since there were other issues, other than the issue of knowledge of Mr. Linden's identity, which could have accounted for the defendant's acquittal, the defendant has failed to meet his burden of proving that trying the defendant on Counts I, III, IV, and V of the White II indictment would pose double jeopardy problems.

Taking another attack on the double jeopardy issue, the defendant argues that the White II indictment charges the defendant with the same offenses of which

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[1]. The government points out that the second alternative is certainly possible since there was no evidence presented at the trial that the defendant actually possessed the birth certificate on November 13, 1989.

he was acquitted in White I.

[4] The test for determining whether successive prosecutions involve the "same offense" is flexible and pragmatic, focusing on the proof actually utilized to establish the charge rather than the formal elements of the alleged identical offenses. Under this "same evidence" test, the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict in the second offense as charged. U.S. v. Ragins, 840 F.2d 1184 (4th Cir.1988).

[5] The defendant contends that the government will utilize the same evidence it produced at the White I trial in an attempt to convict the defendant of the more expanded indictment in White II. The defendant's analysis suggests that he believes that the government will utilize

the same evidence to prove the charge of fraudulently possessing the birth certificate with the intent to defraud the government as it would to prove the charges in the instant indictment. The analysis suggests that the charges stem from the same incident.

The defendant is mistaken as to his analysis of the evidence to be presented in White II. It will not be identical to that presented in White I. One major addition to the White II evidence will be the testimony of Mr. Linden, who was the defendant's co-defendant in White I. In fact, the [Page 49] government argues that most of the White II indictment is based on Mr. Linden's testimony given after the conclusion of White I.

More importantly, the instant indictment does not charge the defendant with the same conduct of which he was

charged in White I. While the indictment in White I charged the defendant with a single act, possessing a birth certificate in another's name with the intent that such document be used to defraud the United States, the instant indictment charges a series of criminal acts which occurred at different time and in different places. The act with which the defendant was charged in Count I in White is not even alleged. Instead, the indictment charges the defendant with conspiracy and sets forth several overt acts done in furtherance of that conspiracy. Proof of these overt acts would not have proven the birth certificate charge in White I. For instance, the criminal act of knowingly possessing a birth certificate in Baldwin's name with the intent to use the document to defraud the government

occurred at a completely different time than the criminal act of conspiring to supply Linden with a false British passport, to fraudulently obtain an INS Form I-94, to make false statements on Linden's U.S. passport application to conceal Linden as an illegal alien. Each of these acts in furtherance of the conspiracy occurred between July 1989 and December 1989. None of these acts charged in White II are identical to the charge in Count I in White I. Only the passport charges encompassed in Counts I and II of White II relate to any charge in White I- and these charges are identical to Count II of White I, the Count resulted in a hung jury.

[6] The defendant points to the Fourth Circuit's opinion in United States v. Ragins, 840 F.2d 1184 (4th Cir.1988), for the proposition that if the same evidence

is presented in the second prosecution, the defendant is automatically considered to be subjected to double jeopardy. This is not a fair reading of the case. In fact, the Ragins analysis may be turned back on the defendant here. In Ragins, the Fourth Circuit analyzed two successive conspiracy prosecutions to determine whether the Double Jeopardy Clause violated by the second prosecution. The court looked to the following five factors in assessing the validity of the double jeopardy claim:

(1)the time periods covered by the alleged conspiracies;

(2)the places where the conspiracies are alleged to have occurred;

(3)the persons charged as co-conspirators;

(4)the overt acts alleged to have been committed in furtherance of the

conspiracies, or any other descriptions of the offenses charged which indicated the nature and scope of the activities being prosecuted;

(5)the substantive statutes alleged to be violated.

Although Ragins deals with successive conspiracy charges and may, in fact, not be applicable to the defendant's case were the first prosecution was not for conspiracy, it does illustrate the government's contention that the individual acts alleged in White II are altogether different in time. place, overt act and substantive statute violated.

The government's burden of proving a conspiracy and proving the commission of the overt acts in Count I necessarily requires the government to prove different facts. At the very least, the evidence which may have been presented in White I

as peripheral and not applicable to the particular charges in White I indictment would gain crucial significance in White II. This analysis applies equally to the defendant's effort to dismiss the allegedly duplicative counts and make his effort to exclude certain evidence.

The defendant's second argument is that even if the government is allowed to proceed on prosecuting Counts I, III, IV and V, it is precluded from using the same evidence it used in White I.

The government concedes that it will be precluded from arguing to the jury that the defendant possessed the birth certificate on November 1 and 13, 1989 with the intent to defraud the United States Government. However, since the government has estab[Page 50]lished that the defendant's acquittal on Count I in White I could have been based on several

factors, evidence previously presented in White I which did not have a direct bearing on either count of the White I indictment should be allowed to be presented in White II as evidence.

In Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 672, 107 L.Ed.2d 708 (1990), the Supreme Court held that "[r]elevant and probative evidence that is otherwise admissible under the Rules of Evidence [should not be excluded] simply because it relates to alleged criminal conduct for which a defendant has been acquitted." In Dowling, the Supreme Court specifically held that an acquittal in a criminal case does not always preclude the government from relitigating an issue in a subsequent action governed by a lower standard of proof. Id., 110 S.Ct. at 672. This language concerning burden of proof may have been troubling to this Court but

for the Supreme Court's further rejection of "the Third Circuit's holding that the common-law doctrine of collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct which the government failed to prove violated a crime." Id., at 673.

The Supreme Court's holding in Dowling suggests that the analysis concerning what evidence to allow in the subsequent prosecution is identical to this Court's Double Jeopardy analysis. It is the defendant's burden to demonstrate that the issue he seeks to foreclose was actually decided in White I. Since the defendant has failed to demonstrate that his acquittal on Count I was based on a jury determination that the defendant did not know Mr. Linden's true identity, evidence relating to this issue cannot be precluded from White II. In Dowling, the Supreme

Court held that evidence introduced to prove a charge of which the defendant is acquitted can be introduced in a subsequent prosecution if the prior acquittal did not determine an ultimate issue in the present case. Id., at 672. Evidence of the defendant's knowledge of Linden's identity, as well as evidence concerning the acquisition and subsequent transfer of the birth certificate, will not be excluded since it would, indeed, be relevant and probative evidence otherwise admissible under the Federal Rules of Evidence simply because it related to alleged criminal conduct for which the defendant has been acquitted. See United States v. Salamone, 902 F.2d 237 (3rd Cir.1990) (applying Dowling and holding that defendant's acquittal on drug trafficking conspiracy charges did not preclude introduction of evidence in

subsequent weapons prosecution that coconspirator had been at locations where weapons involved even though same evidence introduced in drug trafficking case since evidence collateral to offenses charged.)

[7] The government has demonstrated that the jury's acquittal on Count I in White I could have been based on a number of issues. The government should not be precluded from introducing evidence concerning the acquisition and subsequent transfer of the birth certificate. See United States v. Irwin, 787 F.2d 1506, 1516 (11th Cir.1986) (collateral estoppel no bar to government introducing evidence of acts allegedly in furtherance of a conspiracy to violate civil rights when defendant had been previously acquitted of depriving same victim of secured rights).

CONCLUSION

In accordance with the hearing held in

the above case on December 11, 1990, and the Memorandum Opinion December 20, 1990, it is this 20th day of December, hereby

ORDERED that

1)Defendant's Motion to Dismiss for Prosecutorial Vindictiveness is denied;

2)Defendant's Motion to Dismiss on Double Jeopardy is denied.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 92-3130 September Term, 1993
USDC CR 90-0427-01

United States of America,

v.

Blaine A'mmon White,

Appellant

BEFORE: Mikva, Chief Judge; Silberman and Randolph, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing filed September 3, 1993, it is

ORDERED, by the Court, that the petition be denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 92-3130 September Term, 1993
USDC CR 90-0427-01

United States of America,

v.

Blaine A'mmon White,

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

O R D E R

Appellant's Suggestion for Rehearing En Banc has been circulated to the full Court. No member of the Court requested taking a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:
Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 92-3130 September Term, 1993
USDC CR 90-0427-01

United States of America,

v.

Blaine A'mmon White,

O R D E R

Upon consideration of the Appellant's Motion For Stay of Mandate Pending Application for Writ of Certiorari it is

ORDERED, that the motion is granted and that the Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

UNOPPOSED MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI

Blaine A'mmon White
Pro Se
3204 West Strathmore Avenue
Baltimore, Maryland 21215-3717
(410) 358-6443

October 7, 1993

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

UNOPPOSED MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI

Appellant, Blaine A'mmon White, *pro se*, moves this Court pursuant to Fed. R. App. P. Rule 41 and local Rule 7(g)(2), for a stay of mandate pending application for writ of certiorari and for reasons states:

1. Appellant filed timely petitions with this Court, for rehearing and

rehearing en banc, on September 3, 1993.

2. In separate Orders, both dated October 1, 1993, this Court denied Appellant's aforesaid petitions.

3. Appellant is going to file an application for writ of certiorari to the Supreme Court.

4. Appellant is neither able to afford private counsel, nor does he qualify for an appointment of counsel; thus, Appellant is proceeding *pro se*.

5. Appellant's personal participation in this case is essential for the full protection of his Constitutional rights.

6. Appellant is presently released upon personal bond during the pendency of his appeal all conditions of the said bond have been complied with.

7. Should a mandate issue from this Court, Appellant would be remanded into

custody to begin serving his prison sentence; thereby losing his ability to further pursue his appellate rights.

8. Appellant is seeking a thirty (30) day stay of mandate during which time Appellant will file his application for writ of certiorari.

9. Appellant contacted government counsel John Fisher, Assistant United States Attorney, on October 5, 1993; the government does not oppose the granting of the requested stay.

10. Applicant has two (2) viable issues upon which the Supreme Court could grant the application for writ of certiorari:

A. On July 28, 1993, the Supreme Court decided United States v. Dixon, 61 U.S.L.W. 4835. The aforesaid decision reversed Grady v. Corbin, 495 U.S. 508 (1990).

The case at bar represents the first instance, since Dixon, supra, where the Court will be asked to determine whether a defendant is entitled to a special jury instruction when the government is allowed to introduce evidence of prior criminal conduct for which the said defendant was acquitted, when that same conduct forms the bases for a successive prosecution of that defendant upon a subsequent indictment. Five (5) separate opinions were filed in Dixon, Id., thus the double jeopardy issue is far from settled.

B. The decision of this Court in United States v. White, 936 F.2d 1326 (D.C.Cir. 1991), and in the case at bar, with all due respect, are in direct conflict with Ashe v. Swenson, 431 U.S. 651 (1977), United States v. Brown, 983 F.2d 201 (11th Cir 1993), United States v. Bailin, 977 F.2d 270 (7th Cir. 1992),

United States v. Seley, 957 F.2d 717 (9th Cir. 1992), and Pettaway v. Plummer, 943 F.2d 1041 (9th Cir. 1991).

Specifically, this Court's decision in United States v. White, supra, relies upon the verdict of an acquittal coupled with a hung jury to determine that collateral estoppel does not apply. The aforesaid holding based upon such rationale nullifies the rule of Ashe, supra, and its prodigy.

The Court will be asked to resolve the conflict between the Circuit Courts as to whether the fact of a hung jury may be taken into consideration when an Ashe analysis is undertaken.

Therefore, Appellant's request for stay is not undertaken for purposes of delay.

WHEREFORE, Appellant prays this Court for a stay of the mandate pending application for writ of certiorari.

Respectfully submitted,

Blaine A'mmon White
Pro Se
3204 West Strathmore Avenue
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(410) 358-6443

CERTIFICATE OF SERVICE

I, the undersigned, this 3rd day of October, 1993, hereby certify that a true and complete copy of aforegoing Unopposed Motion for Stay was mailed, first class, postage pre-paid to John R. Fisher, Assistant United States Attorney, 555 Fourth Street, N.W., Room 4229, Washington, D.C., 20001.

Blaine A'mmon White

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

PETITION FOR REHEARING

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August 10, 1993

H-2

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

PETITION FOR REHEARING

Petitioner, Blaine A'mmon White, *pro se*, moves this Court pursuant to Fed. R. App. Rule 40 and local Rule 15, for a rehearing upon the following issues:

1. Petitioner's request for a special jury instruction which would have limited the scope and effect of the evidence of Appellant conduct in acquiring

and transferring a fraudulent birth certificate was denied by the district court.

This Court, in its opinion dated July 27, 1993, failed to address the "jury instruction" argument advanced by petitioner. In light of the substantial effect that this Court's ruling would have upon the outcome of petitioner's case, the "jury instruction" issue is meritorious and requires that this Court render a definitive decision upon the same.

2. Additionally, this Court, in a footnote, in its July 27, 1993 decision, opined that it would not revisit appellant's "collateral estoppel" argument. Appellant urges, law of the case notwithstanding, that a manifest justice would otherwise occur if the collateral estoppel issue is not revisited. Furthermore, with all due

respect, the basis of this Court's decision is erroneous. Therefore, petitioner is also entitled to a rehearing upon the "collateral estoppel" issue.

3. Following this petition is a Memorandum of Points and Authorities in Support of this Petition for Rehearing, which is incorporated herein and made a part of this petition which Appellant urges this Court to respectfully consider.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

FAILURE TO RULE UPON REQUESTED SPECIAL JURY INSTRUCTION

Appellant requested, of the district court, a special jury instruction limiting the scope and effect of evidence concerning the Appellant's behavior with respect to the acquisition, possession, and transfer of a birth certificate in the

name of William

Smith Baldwin to Harold Linden. The text of Appellant's requested jury instruction is Exhibit 2 of Appellant's exhibits in the above referenced matter. The district court denied Appellant's special jury instruction request. (Tr. Vol. 3A pp. 3A-2-3-A-4). The requested special jury instruction was lifted, almost verbatim, from Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed. 2d 708 (1990). The rationale for Appellant's special jury instruction was that evidence of other crimes and wrongs or acts under Fed. R. Ev. Rule 404(b) can only be introduced to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident..."

In the case at bar, it was the alleged intent of the government to

introduce the said acts of Appellant with respect to the Baldwin birth certificate as foundation for the prosecution of Appellant upon the passport fraud and aiding and abetting counts of the second indictment lodged against Appellant. (Tr. Vol. 1A, pp. 1A-2-1A-27). Despite the aforesaid assertion on the part of the government, it was the government's intention that an inference of guilt be formed by the jury as a result of the birth certificate evidence. (Tr. Vol. 3A, pp. 3A-2-3). In light of the fact the Appellant was acquitted of criminal wrongdoing with respect to the acquisition and transfer of the Baldwin birth certificate, the district court should have permitted Appellant's special jury instruction.

The efficacy of petitioner's special jury instruction request is made even more

poignant when one considers the statement of government counsel during his jury summation. There, the government argued that because the name "Norman Monroe" appeared on both the application for the Baldwin birth certificate and the wire transfer of funds to Linden, that Appellant knew of Linden's aliases. (Tr. #A-30; lines 7-25 and 3A-31; lines 1-17). Therefore, even if one were to assume, for the sake of argument, that the birth certificate had been only foundational up to this point at trial; the logical inference of guilt drawn from the aforesaid, transformed the birth certificate evidence into a bad act which made the limiting jury instruction a legal necessity. In light of the aforegoing, the failure of the district court to grant the requested special jury instruction is not harmless error. The jury instruction

had a direct bearing upon the outcome of the case, and could have meant the difference between an acquittal and a conviction.

The necessity of a definitive ruling upon the issue of a requested special jury instruction is heightened in light of the reversal of Grady v. Corbin, 495 U.S. 508 (1990). The case at bar is the first to come to this Court subsequent to the said reversal. Appellant is thus entitled to a rehearing on the jury instruction issue.

Appellant, in both his principal brief and his reply brief argued before this Court the legitimacy of the special jury request. Nevertheless, this Court, in its opinion rendered July 27, 1993, did not address the "jury instruction" issue. Therefore, Appellant asserts that he is entitled to a rehearing upon the issue of

the jury request and petitions this Court for the same.

ADHERENCE TO LAW OF THE CASE WILL WORK A GRAVE INJUSTICE AGAINST

APPELLANT

Appellant requested that this Court revisit its ruling with respect to the collateral estoppel issue raised in United States v. White, 936 F.2d 1326 (D.C.Cir. 1991). This Court, citing Lever Brothers Co. v. United States, 981 F.2d 1330 (D.C.Cir. 1993), decided to adhere to law of the case, and not disturb the initial ruling with respect to the collateral estoppel issue.

Appellant petitions this Court for a rehearing in that, with all due respect, the ruling of the Court with respect to this collateral estoppel issue is erroneous. Undisturbed, the said ruling will work a grave injustice upon Appellant.

Ashe v. Swenson, 937 U.S. 436, 90

S.Ct. 1189, 25 L.Ed.2d 469 (1970) requires reviewing Courts to examine the entire record of the prior proceeding, including pleadings, evidence, charge and jury instructions to conclude whether a "rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration."

In the case at bar, this Court, in United States v. White, infra, citing United States v. Scott, 464 F.2d 832, 833 (D.C.Cir. 1972), simply relied upon the fact of the jury's failure to reach a conclusion as to the other charges of the initial indictment in rejecting Appellant's collateral estoppel argument. Under Ashe, supra, the aforesaid rational nullifies the effect of the rule. A hung jury is, by definition, one which is inconclusive. Therefore, it is erroneous

to draw an issue preclusion analysis from the fact of the hung jury alone; as was done by both the district court and the panel which heard Appellant's interlocutory appeal. This Court's attention is drawn to United States v. Bailin, 997 F.2d 270, 279 (7th Cir. 1992). In Bailin, id., the government argued, and that court rejected, the very rationale which was relied upon in the case at bar with respect to the acquittal on one count coupled with a hung jury in a related count. The court, in Bailin, Id., stated that the government cannot prevail with the ... argument that an acquittal on one count coupled with a hung jury on a related count makes it impossible to determine that a jury necessarily established any common element of [the] two defenses against the government. Therefore, at the very minimum, reliance

upon the hung jury on related counts is erroneous. This Court should, at least, make the analysis as required in Ashe, infra, before rejecting Appellant's collateral estoppel argument.

Moreover, the court in Ashe, infra, stated with precision the elements which reviewing courts are to take into account when performing a collateral estoppel analysis; nowhere contained therein is there any directive to include the fact of a hung jury as part of the equation. In fact, only the first circuit in United States v. Aquilar-Aranceta, 957 F.2d 18 (1st Cir. 1992) follows the rationale of the case at bar. All other courts which have taken up the collateral estoppel issue in the context of the case at bar cite rationale similar to that in Bailin, infra. See United States v. Brown, 983 F.2d 201, 202 (11th Cir. 1993), United

States v. Seley, 957 F.2d 717, 721-723 (9th Cir. 1992), and Pettaway v. Plummer, 943 F.2d 1041, 1047 (9th Cir. 1991).

When, as in the case at bar, a criminal defendant has been acquitted for an offense in one proceeding, the law "attaches particular significance to an acquittal", so that the acquittal, "however mistaken [it] may have been" bars retrial for the same offense ... United States v. Scott, 437 U.S. 82, 89, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978). Inconsistent verdicts are thus the price of jurors' inexperience, unanimity, and prerogative. United States v. Bailin, infra.

Therefore, Appellant requests a rehearing upon the issue of collateral estoppel.

CONCLUSION

For the reasons stated above,

Appellant requests a hearing upon the issue of the requested special jury instruction as there was no ruling made by this Court with respect to the same. Additionally, Appellant requests a rehearing upon the collateral estoppel rationale. This Court's ruling, with all due respect, was erroneous, and adherence to the law of the case will work a grave injustice.

Respectfully submitted,

Blaine A'mmon White
Pro Se
3204 West Strathmore Avenue
Baltimore, Maryland 21215-3717
(410) 358-6443

CERTIFICATE OF SERVICE

I, the undersigned, this 10th day of August, 1993, hereby certify that a true and complete copy of aforegoing Petition for Rehearing and attached Memorandum of Points and Authorities was mailed, first class, postage pre-paid to Valinda Jones, Assistant United States Attorney, and John R. Fisher, Assistant United States Attorney, 555 Fourth Street, N.W., Room 4229, Washington, D.C., 20001.

_____

Blaine A'mmon White

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

SUGGESTION FOR REHEARING EN BANC

Blaine A'mmon White
Pro Se
3204 West Strathmore Avenue
Baltimore, Maryland 21215-3717
(410) 358-6443

August 10, 1993

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

SUGGESTION FOR REHEARING EN BANC

Concise Statement of Issue and Its Importance

1. On July 28, 1993, the Supreme Court decided United States v. Dixon, 61 U.S.L.W. 4835. The aforesaid decision reversed Grady v. Corbin, 495 U.S. 508 (1990).

The case at bar represents the first

instance, since Dixon, supra, where this Court is asked to determine whether a defendant is entitled to a special jury instruction when the government is allowed to introduce evidence of prior criminal conduct for which the said defendant was acquitted, when that same conduct forms the bases for a successive prosecution of that defendant upon a subsequent indictment.

2. The decision of this Court in United States v. White, 936 F.2d 1326 (D.C.Cir. 1991), and in the case at bar, with all due respect, are in direct conflict with Ashe v. Swenson, 431 U.S. 651 (1977), United States v. Brown, 983 F.2d 201 (11th Cir 1993), United States v. Bailin, 977 F.2d 270 (7th Cir. 1992), United States v. Seley, 957 F.2d 717 (9th Cir. 1992), and Petaway v. Plummer, 943 F,2d 1041 (9th Cir. 1991).

Specifically, this Court's decision in United States v. White, supra, relies upon the verdict of an acquittal coupled with a hung jury to determine that collateral estoppel does not apply. The aforesaid holding based upon such rationale nullifies the rule of Ashe, supra, and its prodigy.

Appellant has filed a Petition for Rehearing which is appended hereto and made a part of this Suggestion for Rehearing En Banc; the Court is asked to consider the former as rationale for this suggestion.

Respectfully submitted,

Blaine A'mmon White
Pro Se
3204 West Strathmore Avenue
Baltimore, Maryland 21215-3717
(410) 358-6443

CERTIFICATE OF SERVICE

I, the undersigned, this 10th day of August, 1993, hereby certify that a true and complete copy of aforegoing Petition for Rehearing and attached Memorandum of Points and Authorities was mailed, first class, postage pre-paid to Valinda Jones, Assistant United States Attorney, and John R. Fisher, Assistant United States Attorney, 555 Fourth Street, N.W., Room 4229, Washington, D.C., 20001.

Blaine A'mmon White

APPENDIX J

JURY INSTRUCTION REQUESTED BY PETITIONER AND GIVEN AT FIRST TRIAL

[IIIB-46] The birth certificate in this case is alleged to be the identification document. The parties agree the defendant actually possessed the birth certificate.

2, that the defendant intended to use the document to defraud the United States; and

3, that the defendant acted wilfully.

Now, Ladies and Gentlemen, you're advised that the element of knowledge may be satisfied by an inference or inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's

knowledge of a fact may be inferred from the wilful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of wilfulness or knowledge.

In this connection, you are further instructed that if you find that the application for the duplicate birth record and the affidavit identifying Harold Linden as William Smith Baldwin which the defendant, Mr. White, filed to assist in the issuance of the passport were not completed for a legitimate legal purpose by an attorney during the usual course of his professional practice, and under the facts and circumstances known to him he

had every reason to believe that such documents had not been issued for a legitimate legal purpose, and the defendant deliberately and consciously closed his eyes to what he had every reason to believe was fact, such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in this case, that the defendant knew such purported documents had not been issued for a legitimate legal purpose and hence were knowingly completed by him.

DEFENDANT'S REQUESTED JURY

INSTRUCTION No. 4

You have seen and will take back to the jury room government exhibits 1, a birth certificate application, and 2 a birth certificate in the name of William S. Baldwin.

You are instructed that you cannot infer any criminal behavior on the part of the defendant from either the fact that Mr. White filled out an application for or possessed the Baldwin birth certificate.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	Docket No. CR 90-0427 TFH
vs.	Washington, DC
	Wednesday, March 4, 1992
	9:30 a.m.
Blaine A. White,	
	EXCERPT
Defendant.	

Volume 3A
TRANSCRIPT OF TRIAL
Discussion of Jury Instructions and
Government's Closing Arguments
Before the Honorable Thomas F. Hogan
United States District Judge, and a jury

APPEARANCES:

For the Government: Eric Dubelier, Esq.

For the Defendant: James Jones, Esq.

Court Reporter: WILLIAM D. MC ALLISTER
Official Court Rprtr
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U.S. Courthouse
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Washington, D.C.
20001-2803
(202) 371-6446

Proceedings recorded by stenomask, transcript produced from dictation
Pages 3A-1 through 3A-36

[3A-2]

[Defendant present.]

THE COURT: Let me just take up a few things and then you can all address me with your concerns.

Defendant's requested Jury Instruction Number 4, that I read at the lunch hour, as to inferring any criminal behavior on the part of defendant from the fact Mr. White was issued the birth certificate or he filled out an application for it, referencing the state of the law in this case, that is, that he was found not guilty of the charge of intent to defraud by securing of the birth certificate and filling this application for it and therefore cannot be used in this case.

I have already ruled that the

facts could be used but that the government couldn't make any argument to the jury or introduce any other evidence tending to make the birth certificate the gravamen of the offense against the defendant in this trial.

How does the government intend to use the fact of the birth certificate or the application? You have it in evidence he obtained it and that he applied for it. What is wrong with the instruction the way he has drafted it?

MR. DUBELIER: Your honor, I would submit to the Court that it is perfectly permissible for the jury to infer that the act of getting the birth certificate, in addition to all of the other evidence, all of the other actions taken by Mr. White, [3A-3] coupled, all that evidence together can establish guilt.

I think it is incorrect to tell the jury that they cannot infer that the fact that the birth certificate was obtained, and the fact that Mr. White gave it to Mr. Linden, can be used by them in terms of all of the evidence and all of the circumstances in reaching a determination as to whether or not the defendant is guilty.

I would analogize this to the Dowling case, Your Honor, where, although we weren't talking about jury instructions there, in Dowling, certainly the jury in that case could infer from the previous evidence that defendant Dowling had committed a burglary, that it was either likely or more than likely that he had committed the instant armed robbery that he was charged with in the pending indictment even though he had been acquitted of that burglary.

Otherwise, there would be no use for the evidence at all. There would be no reason to put the evidence in.

THE COURT: That was the original argument. I will deny the request to use Defense Jury Instruction Number 4 because I think it is not accurate as to the state of the law of this case totally.

I sympathize with the defendant and his concerns about retired on the same count, and that is what it went to the Court of Appeals on, but as I ruled earlier, the Court of Appeals did not reverse my ruling that the application for, and [3A-4] the submission of, the birth certificate could be brought out in evidence in this case, and that was in my reported opinion Fed. Sup., that the Court of Appeals reviewed in their opinion, despite their language I think which did

not have full reference to the record and to the government's brief and to my opinion that they made concerning evidence about the birth certificate.

I have already ruled that that could come in, and the fact he had an application for it. What can't come in is the government using that, as I said, for the gravamen of the offense in this case.

So, I will deny that, but the defendants have taken their exception from that and preserve that for the record...

[3A-20] That is what this case is all about, because if you don't believe they met in '84, and you don't believe that Mr. Linden told Mr. White that his name was William Smith Baldwin, then all of the other things that Mr. White has told you cannot be correct. It all becomes irrelevant.

If you don't believe they met in

'84, and you don't believe that Linden told him his name was William Smith Baldwin, then Mr. White is just not telling you the truth and that he is guilty of the offenses charged.

Now, carefully consider the last two counts on the passport application because they are different. One of the counts charges that Mr. White assisted Mr. Linden in obtaining the passport by giving him the name and Social Security number to use on the passport.

Clearly, he gave him the birth certificate that was used to get the passport, and that birth certificate was in the name of William Smith Baldwin. Linden claims that the Social Security number came from Mr. White.

You have to decide is it reasonable, based on the evidence, that Mr. Linden went into the law offices of

Lee & Harvey, went through the closed files, and found Jeff Brown's Social Security number in a file from years ago and used that, or is it more reasonable to you that would have been something that Mr. White would have had the opportunity to so and the opportunity to give him that Social Security number.

In the second count, it is very different from the first count on the passport. That is Count Five. That charges Mr. White with himself falsifying a portion of the passport of the application, and that is the affidavit that becomes a portion of the application once it is signed.

Essentially, that stated, and Mr. White stated, that he had known Mr. Linden for at least five years or for five years, and that he was a U.S. citizen.

Clearly, if you reject Mr.

White's argument that he had met Mr. Linden back in 1984, and Mr. Linden had introduced himself as William Baldwin, then Mr. White must be guilty of Count Five, because there is no way that he could have known him for five years, known him as a U.S. citizen, and known his name to be William Smith Baldwin. I will talk about that a little bit later.

Let's talk about the birth certificate. You heard Mr. [3A-22] Taylor testify as to the rules and regulations at the Department of Vital Records. I think you will remember he was the first witness yesterday.

Mr. Taylor said there was a different set of rules for whether or not you are getting a birth certificate for a deceased person or for a live person. I think you will remember that if you think back carefully.

What he said was the only way to get a birth certificate for a live person is if you are the person or you have an affidavit from someone, a live person, authorizing you to get that birth certificate.

But what he told you was it is a different story when it comes to a deceased person, because we make accommodations to attorneys if the person is deceased. Attorneys handle estate matters. It is necessary for them to come in and get birth certificates. We make accommodations.

But what you have in this case is that Mr. White applies for and obtains, by his own admission -- this isn't in dispute -- he obtains the birth certificate for William Smith Baldwin. He filed the application on 11-1 of '89, and there is the birthday of William Smith

Baldwin, and he gets the birth certificate.

Well, we know that William Smith Baldwin was deceased. That is how we got the birth certificate, because Mr. Baldwin was deceased. I will submit to you that -- where did he get [3A-23] that date of birth? Now, he says, Mr. White says he can't remember. He says he cannot remember.

What I would suggest to you is that you read very carefully the obituary notice, which is Government's Exhibit Number 7. You are going to have the opportunity to take this back, and just for one second I am going to hold it up because it is not a regular obituary notice. ...

[3A-29] She also testified that she knows she called Mr. White. She said Mr. Layton gave me your name as a credit

reference for G & W Finance & Leasing to rent an apartment, and Mr. White said it's okay, rent the apartment.

Now, Mr. White wants to tell you now, no, no, no, she never said Layton. Well, her recollection is that she said Layton.

So, we have Mr. White attached to the name Mr. Layton once, but not once, twice. Sandhurst Corporation. Look at the articles of incorporation that are in there, and Mr. Layton is listed, Mr. Layton, Mrs. Layton, Mr. Layton, Jr. Those are the names listed under the articles of incorporation as the directors of Sandhurst Corporation, that Mr. White filled out for Mr. Linden.

Now, if you want to believe now, if he wants to come in and tell you, almost two years later or over two years later, that no, no, he gave me those

names, I never checked. I never knew that that was the alias he was using, folks, it doesn't [3A-30] make sense.

What makes sense is clearly Mr. White knew that this was an alias being used by Mr. Layton, and he took that name and put it in the articles of incorporation. That is what the evidence is going to show you. That is what the documents will show you if you go through and you look at them.

Let's talk about Norman Moore. Where does Norman Moore come up? Again, Norman Moore comes up twice. The first time -- and this is pretty interesting -- birth certificate application.

Take a good look at Government Exhibit 1 when you go back there. William H. Moore. Okay. We have William H. It is not using Norman Moore, we have William H. Moore on here. Mr. White is saying --

Mr. White is saying that this was a name given to him by Mr. Linden, who is going to be the witness for obtaining the birth certificate, although Mr. Moore never shows up, William Moore.

And you think, well, okay, I could buy that, that may not be a problem, but Mr. Moore pops up again in the case. Mr. Moore pops up again in the American Express Moneygram in October, and on that it is Norman Moore.

Now, Mr. White says that on October 24th of 1989, he sent some money to Mr. Linden in Arizona, right? He said I forwarded it to him, I cashed the check, the $5,000 check that we talked about over here, 5,400, October 29, and then 10-29 he

[3A-31]

forwards that money to Mr. Linden in Arizona. But look at the Moneygram. He doesn't sent the money to Mr. Linden. He

sends it to Norman H. Moore. We have the money to Mr. Linden. He sends it to Norman Moore. We had the name again.

Does that tell you that he knew, that Mr. White that Mr. Linden was also using the name Norman Harold Moore? I think so. I think so. How else would Mr. Linden get the money? How else would he get the money?

It is Mr. Linden's money. Mr. White told you -- I believe his exact words were "it's a death penalty offense for a lawyer if you mess up a trust account." If you mess up somebody's money in that trust account, you have got a real problem.

Well, here he has taken out $5,000 of Mr. Linden's money and sending it, not to Mr. Linden, as he says he did, but to somebody named Norman H. Moore, and the reason was clearly Mr. White knew that

Mr. Linden was using the name Norman H. Moore, and he couldn't be using his real name.

Now, Bill Baldwin. Passport application. Now, you will notice there is no evidence, none, zero, that prior to November 1st of 1989, Mr. Linden ever used the name Bill Baldwin. Sift through all of the documents, all of the papers, take your time. There is a lot of Stuff. You need to look at it all.

There is not one piece of evidence that Mr. Linden used the name Bill Baldwin prior to November 1st of 1989. Why is that important? Very simple. He didn't have the name. He didn't get it until November 1st of 1989, when Mr. White got him the birth certificate, November 1st, 1989.

You won't find it. You can look.

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	. Docket No. CR 90-0427 TFH
vs.	. Washington, DC
	. Monday, March 2, 1992
	. 9:58 a.m.
Blaine A. White,	.
Defendant.	.

. . . . . .

Volume 1A
Transcript of Trial
Before the Honorable Thomas F. Hogan
United States District Judge, and a jury

APPEARANCES:

For the Government: Eric Dubelier, Esq.

For the Defendant: James Jones, Esq.

Court Reporter: WILLIAM D. MC ALLISTER
Official Court Rprtr
Room 4806-B,
U.S. Courthouse
3rd & Constitution, NW
(202) 371-6446

Proceedings recorded by stenomask, transcript produced from dictation

Pages 1A-1 through 1A-99

[1A-34]Eric Dublier for the government, James Jones for the defendant.

[Segments not requested to be transcribed.]

[Prosecution opening statement.]

MR. DUBLIER: Thank you, May it please the Court, good afternoon, ladies and gentlemen.

My name is Eric Dublier and I am an Assistant United States Attorney here in Washington, D.C. As an Assistant United States Attorney, all that means is that I am the person here in court for the next several days that is responsible for representing the United States in connection with the criminal case against Mr. White.

What that means, as the Judge has told you, is that I am not a witness to the case. I have no evidence about the

case. My job is to call the witnesses that know about this case to the stand, let them testify so you can hear what they have to say.

My job is to present to you whatever exhibits and documents there may be for your consideration, and then at the end of the trial I will have an opportunity to make an argument to you and essentially argue to you the position of the United States as to why Mr. White is guilty of the charges contained in the indictment.

Then, it will be your job, as a jury collectively among yourselves, the 12 people that go back to deliberate, to make a decision based on the evidence, not based on my argument [1A-35] or the argument of Mr. Jones, but based on the evidence that you have heard from witnesses on the witness stand, that you

can see by looking at the documents and records that are going to be introduced into evidence, as to whether or not Mr. White is guilty of the charges contained in the indictment.

Now, Mr. White is charged in four separate counts of an indictment; and when you go back to deliberate, you are going to have a copy of the indictment. You will be able to read it. You will be able to see it. You will see exactly what the United States has accused Mr. White of doing.

But essentially what you are going to see, to make it simple for purposes of following this trial, is that all of the counts in the indictment are essentially intertwined and they involve conduct relating to a man by the name of Harold Linden, and Harold Linden was a man who -- I am going to tell you the story --

but essentially he is a man that wanted to get into the United States and couldn't legally get here.

The United States has charged Mr. White with helping Mr. Linden get into the United States and obtain a United States passport that he was not entitled to. Now, to follow this story, we have to go back several years, because this goes back a couple of years ago when this all started, and essentially it all started back in December of 1988, three and a half or so years ago.

Back in December of 1988, Mr. Linden was in jail in ...

[1A-55] ... MR. DUBLIER: I would ask the record reflect that the witness has identified Mr. White.

THE COURT: Without objection, I will.

BY MR. DUBLIER:

Q Now, sir, do you have a recollection that on November 1st of 1989, you saw Mr. White at your office at the Department of Vital Records?

A Yes, I remember seeing Blaine on that date.

Q Sir, I will show you what has been marked as Government Exhibit 1.

[Government's Exhibit 1 was marked for identification.]

BY MR. DUBLIER:

Q And ask before you begin testifying about it, if you recognize what it is.

A It is an application for a birth certificate.

Q How is it that you recognized that? Is that a form that was regularly used in your office?

A That is the normal form that is available in the customer waiting area, that customers fill out and present to the

cashier for a birth certificate.

Q Now, does that form have any markings of your on there, which you can personally identify as something that you wrote on [1A-56] the form?

A Sure. Up in the right hand corner there is "O.K. TT."

Q Now, in connection with Government Exhibit 1, is that something that is related to your recollection having seen Mr. White on November 1st of 1989?

A Yes, it is.

Q Would you explain how that is so?

A Well, I remember seeing -- I remember either being in the waiting room or seeing Blaine in the waiting room, but knowing Blaine was an attorney, and as I say, we try to get attorneys out as fast as possible, I went and said how can I help you. You know, Blaine gave me -- told me why he was there -- he gave me this. I

ran it through the cashier. The cashier validated it, and we sent it right back, I told them to bring it right out.

Q And that form in essence would authorize the releasing of the birth certificate for the man named on the form, is that correct?

A Correct.

Q Is that form, to your knowledge, a record that was kept within the course and scope of the activities within the Department of Vital Records?

A Yes, it is, we keep these.

MR. DUBLIER: Your Honor, at this time I would offer, [1A-57] file, and introduce into the record Government Exhibit 1.

MR. JONES: May we approach the bench?

THE COURT: Sure.

[Bench conference on the record.]

MR. JONES: Your Honor, for the record I am going to object, and I want to place that on the record.

THE COURT: On the same grounds a previously on the motion of limine that this was a retrial issue which he was not found guilty of and is barred by double jeopardy?

MR. JONES: That is correct, Your Honor.

THE COURT: And for the reasons that I gave earlier, that this was fact, that he is introducing it not as evidence of the essential element of the crime, which he then committed again, I will allow it. The way it has been charge [sic], he has been charged with a different offense at this time. So I'm allowing it.

[End of discussion at the bench.]

THE COURT: It is admitted as

Exhibit 1 in evidence.

[Government's Exhibit 1 was received in evidence.]

BY MR. DUBLIER:

Q Mr. Taylor, I am going to show you what is marked as Government Exhibit 1-A and ask you whether or not, by looking at 1 and 1-A, to you 1-A just appears to be an enlargement of 1.

A Yes.

[Government's Exhibit 1-A was marked for [1A-58] identification.]

MR. DUBLIER: Your Honor, at this time I would offer, file, and introduce into the record 1-A.

THE COURT: That is an enlargement of Exhibit 1. All right. It will be admitted for the same reason that I gave earlier.

[Government's Exhibit 1-A was received in evidence.]

BY MR. DUBLIER:

Q Mr. Taylor, if you would, could you point out for the ladies and gentlemen of the jury where on there your initials are which indicate that you approve?

A It says "O.K. TT" right there.

Q Right up there where I am pointing to?

A Yes.

Q To your recollection, that is in fact, Government Exhibit 1-A is an enlargement of the document that Mr. White submitted to you on November 1st, 1989 --

A Yes, it is, sir.

Q -- to obtain the birth certificate of William Smith Baldwin?

A Correct.

Q Mr. Taylor, I am showing you what is marked as Government Exhibit 2.

[Government's Exhibit 2 was marked for identification.]

BY MR. DUBLIER:

[1A-59]Q I would ask you whether or not you recognize that.

A This is the birth certificate that we gave when Blaine came in.

Q Would you be a little more -- when you say "we" --

A That I gave, my office.

Q Do you recognize that as being the birth certificate that was given to Mr. White on November 1st, 1989, in the connection with the application contained ion Government Exhibit 1?

A Yes, sir.

Q That birth certificate, does it have a stamp on it certifying it?

A It has the seal of the Registrar of the State of Maryland.

MR. DUBLIER: Your Honor, at this time I would offer, file, and introduce into the record Government

Exhibit 2.

THE COURT: With the reasons given previously to preserve the objection, I will overrule the objection and allow it in.

[Government's Exhibit 2 was received in evidence.]

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	Docket No. CR 90-129
vs.	Washington, DC
	July 2, 1990
	10:00 a.m.
Blaine A. White,	
	EXCERPT
Defendant.	

TRANSCRIPT OF JURY TRIAL
BEFORE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT COURT

VOLUME IIIA

APPEARANCES:

FOR THE GOVERNMENT: ERIC DUBELIER, ESQ.
555 4th Street, N.W.
Room 5832
Washington, D.C. 20001

FOR THE DEFENDANT: JAMES JONES, ESQ.
Lee & Harvey
1212 New York Ave., NW
Washington, D.C. 20005

ALSO PRESENT: MR. BRIAN DUE

Court Reporter: WILLIAM D. MC ALLISTER
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Room 4806-B,
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(202) 842-5069

(Pages 1-57)

COMPUTERIZED TRANSCRIPTION OF NOTES

[IIIB-2]

I N D E X

Opening Argument by Mr. Dubelier
Page 4

Argument by Mr. Jones
Page 15

Closing Argument by Mr. Dubelier
Page 23

[IIIB-3] (Defendant present.)

(Testimony previously transcribed in Volume IIIA.)

* * * *

THE COURT: Have you got all the exhibits out?

MR. DUBELIER: Yes, sir.

THE COURT: Ready to go?

All right you can bring the jury in then.

(Jury in.)

THE COURT: All right, Ladies and Gentlemen, you may be seated.

Ladies and Gentlemen, the time has come for the summation or closing arguments, as I had explained to you earlier, and they are part of the case. The attorneys get to address you at the end of the case.

As I mentioned to you, the opening statements were like road maps, where the parties laid out what they intended to prove or what they believed the case was about. The closing arrangements, or summation, are just that; that is, they're arguments to you summarizing the evidence from the particular party's point of view and the lawyer's laying out that evidence, convincing you of the rightness of their case or their side.

In this case, Ladies and Gentlemen, being a criminal case, the government goes first in the closing arguments and has a right to have a rebuttal closing argument,

because the [IIIB-4] government has the burden of proof at all times to prove the defendant guilty of the charges beyond a reasonable doubt and therefore has the opportunity to address you first and last. The defendant will address you in between.

So, Ladies and Gentlemen, I'm going to ask you to pay close attention to these closing arguments and remember again, however, unless it's a stipulation agreed to by the parties, what attorneys say is not evidence in the case, but I would ask you to give close attention to each side in this case as they present their closing arguments to you.

All right, we'll recognize first the government in the case.

MR. DUBELIER: Thank you, your Honor.

OPENING ARGUMENT

BY MR. DUBELIER:

Ladies, and Gentlemen, I'm just going

to spend about probably 10 and 15 minutes to sum up the evidence that the government presented over the last several days, and I'm going to get in a lot, because I tend to talk fast, and the more I get into it, the faster I talk, but I'll try and make everything as clear as I possibly can, because really what I want to do in my first opportunity to speak to you is sum up most of the evidence in this case which is not in dispute.

There seems to be a lot of agreements about what occurred and what really is going to be at issue when you go [IIIB-5] back to deliberate and try to determine whether or not Mr. White is guilty is what was his intent, what was he thinking at the time all these events were occurring, and to be able to do that, the Judge will tell you in his charge to the jury what you have to do is you have to look at all

the circumstances around this entire incident, and you're going to have the difficult task of coming to a conclusion based on those circumstances as to whether or not the defendant, Mr. White, has a criminal intent, that is, an intent to commit fraud in this case essentially by obtaining the birth certificate, as well as assisting Mr. Linden in obtaining the passport.

And let's begin by talking about some things that don't appear to be in dispute based on the evidence that was presented. First, we know that Mr. White went to the Department of Vital Records for the State of Maryland on November 1st of 1989, and he obtained a birth certificate in the name of William Smith Baldwin. We know he did that. Mr. White admits he did it, and Mr. Taylor, who was the director of that particular office, testified that he

recalls Mr. White coming in and obtaining the birth certificate on that day.

We also know that Mr. White filled out this exhibit, and we have a stipulation that I entered into with counsel that an FBI expert analyzed this document and he came to the [IIIB-6] determination that the handwriting that appears on this document was, in fact, the handwriting of Mr. White, as well as the fact that an FBI expert examined this and determined that Mr. White's fingerprints were on the document. So I don't believe we have any dispute Mr. White filled out this entire document and he submitted it to the State of Maryland and in return obtained the birth certificate, which is listed, and you'll see it when you go back and deliberate, Government's Exhibits 2, which is the birth certificate of William S. Baldwin, a man who was born on February

14th of 1927.

We further know now that Mr. Baldwin was a judge in Baltimore for many years, lived in Baltimore for many years, and was involved in politics in Baltimore, and you're going to see a copy when you deliberate again of the obituary that appeared in the Baltimore Sun for Judge Baldwin on October 30th, and it's quite a prominent obituary. You can see it's not the normal small obituary, but it's up top here in big letters, and you'll have the chance to look at that when you go deliberate, and it will tell you a bit about Mr. Baldwin, who's listed in this birth certificate application.

Now we also know and there's no dispute that Mr. White, in addition to filling out this entire document, wrote the name William H. Moore on the bottom and signed the name William H. Moore on

the bottom and he did so without [IIIB-7] ever having spoken to Mr. Moore, without ever having any authorization from Mr. Moore to sign Mr. Moore's name on the document, and he filed this as an official document with the State of Maryland to obtain that birth certificate, and we now know that the applicant, that is, the person requesting this birth certificate, was not Mr. Moore, nor did Mr. Moore sign this, nor did he give his authorization for his name to be signed on there.

We also now know that the reason for the request, that is, court proceeding, is not true, that the reason this birth certificate was being obtained was so that it could be given by Mr. White to another individual so that individual could obtain a passport.

Now Mr. Taylor testified and he told us that he has a recollection of this

incident and has a recollection of supplying the birth certificate to Mr. White, and he further told us that under no circumstances did Mr. White ever tell him that it was for anything other than an estate, to handle an estate, that is, to settle a [sic] estate of a person who is deceased, and what he further told you is that under no circumstances would he ever give a birth certificate to a third person of a live individual.

He said that's handled in another department in his office. He doesn't go anywhere near that, that under, the only circumstance under which the birth certificate would be [IIIB-8] issued is if it was for handling of an estate of a deceased person.

Now, Mr. White testified that that is not true, that he told Mr. Taylor the circumstances of, under which he was

obtaining this. Mr. Taylor's recollection is completely different from that of Mr. White, and you're going to have to make a decision essentially who to believe based on what occurred in that conversation, because it's not really open to interpretation. Mr. Taylor says one thing; Mr. White says something else.

I would submit to you someone is mistaken, and a mistake in this circumstance is going to benefit no one other than Mr. White. Mr Taylor has no motive to come in here and testify as to anything other than the truth. In fact, he's a friend of Mr. White's, they grew up together, they attended the same church, they went to college together, and he's coming in and he's telling you under oath, "This is what I recall" and he says, I recall that he told me it was for an estate and for no other purpose.

Now we also know and its not in dispute that Mr. White and Mr., who we now know as Mr. Linden, went to the passport agency, the Congressional Passport Office on November 13, 1989. Mr White filled out this affidavit, stated that he had known the individual for at least five years. [IIIB-9]

He also, apparently the applicant stated that the briefcase containing all I.D. documents was stolen, and the clerk, Mr. Flynn, wrote that on the form. And additionally, we also know that the individual who we know as Mr. Linden filled out this passport application, and in return for filling out this passport application, he obtained the United States Passport.

What do we know that's false on this application? Well let's start with the social security number. We know that that

social security number belongs to a man by the name of Jeff Brown, who went to Mr. White's law firm sometime approximately two years ago on a personal injury case, never did, in fact, retain anyone at Lee & Harvey, but gave all his personal information over, that is, name, date of birth, address, social security number, and then two years later, the remarkable coincidence occurs that his social security number shows up on this fraudulent passport application.

And I would submit to you, Ladies and Gentlemen, that common sense will lead you to no other conclusion but the only way that got on there was Mr. White gave that to Mr. Linden to put on there and that's very, very interesting about this, and it's so obvious when you look at the, the real one this is the actual application that was filed at the passport office,

look at this carefully. It's all in the same color ink. [IIIB-10]

You don't have to be any type of expert to see that it's all in the same color ink except the social security number, which is in a different color ink, which would lead one to no other conclusion than it was written there at a different time, and I would submit to you that it was written in at the last minute, when they realized, "We've got to put some real social security number on there, because if we put a complete fake one, if we make one up and they run it in the computer, it's going to come back as bad. So we have to put a social security number on there," and it turns out that the number that gets on there is a number that belonged to a former client of Lee & Harvey.

What else is false? Well, father's

name and mother's name we know are the true father and mother of William Smith Baldwin, so that information is false. We also know, and this is very important, permanent address. It doesn't say office address. It doesn't say mailing address, 111 South Calvert Street, Baltimore, Maryland, 21202.

Well, what do we know about that permanent address? We know that that's the law offices of Lee & Harvey. Well, we know that Mr. Linden wasn't living at that office. He wasn't working at that office. That wasn't his permanent address. This telephone number is the phone number of Lee & Harvey in [IIIB-11] Baltimore. This telephone number is the business phone number of Lee & Harvey in Washington, D.C. All of this information is false.

And Mr. White is going to tell us that he looked at this at the passport

office, but he only looked at the top, and when he got to No. 2, he stopped reading. Now isn't that a remarkable coincidence, that he read the stuff, which mailing address, well that's fine, there's no problem with that, and name, there's no problem with that, but once it began with all the false information that's contained on this document, he stopped reading?

And so he's going to tell you or he wants you to believe that he had no idea what was on that document when it was filed by Mr. Baldwin and presumably that if he had seen that information, he would have corrected it, because he would have known that it would be false.

I would submit to you Ladies and Gentlemen, that that's simply not a credible explanation, that he went to the passport office and that he knowingly allowed William Smith Baldwin, who he knew

to be Mr. Linden, to file this false passport application to be able to obtain what's been marked as Government's exhibit 5, which is a United States passport in the name of William Smith Baldwin with Mr. Linden's photograph in there.

Now we know that when Mr. Linden was arrested in [IIIB-12] Phoenix, Arizona, he had a passport, he had the birth certificate, he had a British passport in the name of Norman Harold Moore, you're going to se that, he had a Moneygram, which there's been a lot of discussion about, which reflects a transfer of $5,000 from Mr. White to an individual by the name of Harold Moore in Phoenix, Arizona, in October of 1989, and again that's critical, because the transfer of funds to another alias, another fake name of the, Mr. Linden, occurred prior to the obtaining of the birth certificate and the

filing of the passport application.

I would submit to you, Ladies and Gentlemen, that that establishes that there's knowledge on the part of Mr. White, that is, he had every reason to know that this man was not the William Smith Baldwin who was born in Baltimore, Maryland, on February 14th of 1927.

Now when Mr. White was originally confronted with this, he made some statements. He made some statements to Agent Klugiewicz in Phoenix as well as some statements to Agent Due here in Washington, D.C., and what's very important is that he told both of the agents that when Linden came to him, he already had the birth certificate. He told them both that, and there doesn't seem to be any dispute about that, because even on cross examination, neither agent was impeached as to what was said. He

told both agents, "When Linden came to me, he had the birth certificate."

[IIIB-13] Well, then Mr. White gets on the stand, and he's going to tell us well, he did have a birth certificate. He had xeroxed copy one, which is a convenient way to explain away the statement to the agent. But why didn't he tell either agent then?

He didn't tell either agent that he had gone to the Department of Vital Records in the State of Maryland and obtained a certified copy of the birth certificate for Mr. Linden. Certainly that was relevant, and that didn't appear anywhere in the statements that the defendant, Mr. White, made to either agent when he spoke with them.

Additionally, folks, you're going to see the bank records, which reflect wire transfers of funds into Mr. Linden's

account, and you're going to see on those wire transfers of funds, on the first one a transfer from an individual by the name of Harold David and on the second one a transfer from an individual by the name of Harold David Linden, which again I would submit to you establishes knowledge that Mr. White had knowledge of the true identity of this individual prior to the filing of the passport application.

Additionally, you're going to see a check. Now Mr. White has told us that he did not get paid any money whatsoever to assist this individual in obtaining these documents. You're going to see a check which is dated [IIIB-14] November 1, 1989, which is the same day that Mr. White went to the Department of Vital Records and obtained the birth certificate, November 1, 1989, and the notation on the check, it's made out to cash, which essentially

allows Mr. White to go into the bank, submit the check made out to cash, and receive $2,600 in cash, and the notation is, "Documents of identification per client."

Well, wouldn't common sense lead us all to believe that this transaction had to do with the obtaining of this birth certificate? But Mr. White is going to tell us, "No, that was just a business disbursement of funds in a trust account that I was returning to Mr. Linden. Essentially those were his funds, and I was returning them to him."

But he didn't write that on the check, folks. He didn't write "disbursement of funds," which he could have written. He wrote on there "documents of identification per client," which again I would submit leads you to the only conclusion that that transaction

of $2,600 had to do with the obtaining of this birth certificate on November 1st of 1989.

Now, Ladies and Gentlemen, I would submit to you that the sole issue to be resolved in this case is intent, that is, what was in Mr. White's mind at the time that he was involved in these transactions with Mr. Linden, and I would submit to you that all of the circumstances of this case and all of the facts of this case point to the fact that Mr. White either had direct knowledge or certainly had reason to believe that this man that he was dealing with was not the William Smith Baldwin who was born on February 14th of 1927, and if that's the case, and all of the circumstances point you in that direction and to that conclusion, then there was no conclusion but that Mr. White is guilty as charged as to both counts, that is, Count

I, for possessing the birth certificate with an intent to use it for a fraudulent purpose, and Court 2, aiding and abetting Mr. Linden in obtaining the passport on November 13th of 1989.

Thank you very much for your attention.

THE COURT: Thank you, sir.

Mr. Jones, on behalf of Mr. White?

ARGUMENT

BY MR. JONES:

May it please the Court, Government counsel, Ladies and Gentlemen of the Jury: Will the real Harold Linden please stand up. How about William S. Baldwin or Norman Harold Moore or William Layton or Larry Dale Lewis? How about Blaine White? You know where Blaine White is.

Ladies and Gentlemen, as I told you

in my opening, this is a case that's rooted about and around an individual that is very artful in the deception of identification. Throughout the course of this trial, we've seen the government put on the evidence after evidence after evidence with regards

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	Criminal No. CR 90-129
vs.	Washington, DC
	June 29, 1990
	9:30 a.m.
BLAINE A. WHITE,	
Defendant.	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	ERIC DUBELIER, ESQ. 555 Fourth St., NW Room 5832 Washington, D.C. 20001
FOR THE DEFENDANT:	JAMES JONES, ESQ. 1212 New York Ave, NW Washington, D.C. 20005
ALSO PRESENT:	MR. BRIAN DUE
OFFICIAL COURT REPORTER:	ANNELIESSE J. THOMPSON 6814 U.S. Courthouse 3rd & Constitution, NW Washington, D.C. 20001 (202) 842-5069

[II-22] MR. JONES: Yes. We don't believe that the government has met its burden and that their intimates know everything of the knowledge that Mr. White knew Mr. Linden by anything else, any name other than the name of William Baldwin, and as your Honor may recall, throughout the last hearing before your Honor at the suppression hearing, the government indicated at that time that they had nothing to show knowledge, and we do not believe at this point that they have sufficiently, after a full trial, met their burden.

THE COURT: What does the government have in Count I that Mr. White knowingly possessed the birth certificate with the intent to be used to defraud the United

States, and that ties into Count II additionally, in other words, assisted Mr. Linden to obtain a passport through fraud?

MR. DUBLIER: Your Honor, its the government's position that the actual acts charged are not in dispute and the issue only is the intent of the defendant at the time he performed the acts.

It is the government's position that essentially there are five pieces of evidence which go to the defendant's intent, the first being an obituary notice that appeared in the Baltimore Sun newspaper on October 31st of 1989, a day before the birth certificate was obtained, indicating that Mr. Baldwin had been a district court judge for many years in a court in Baltimore. And the obit is very prominent. It takes up

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	Criminal No. CR 90-129
vs.	Washington, DC
	June 28, 1990
	1:30 p.m.
BLAINE A. WHITE,	EXCERPT OF AFTERNOON
Defendant.	SESSION

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

VOLUME I

APPEARANCES:

FOR THE GOVERNMENT: ERIC DUBELIER, ESQ.
555 - 4th Street., NW
Room 5832
Washington, D.C. 20001

FOR THE DEFENDANT: JAMES JONES, ESQ.
Lee & Harvey
1212 New York Ave, NW
Washington, D.C. 20005

OFFICIAL COURT REPORTER: ANNELIESSE J. THOMPSON
6814 U.S. Courthouse
3rd & Constitution, NW
Washington, D.C.
20001
(202) 842-5069

[I-11] You're also going to see that on October 10, 1989, there was a wire transfer into that trust account in the amount of $4,686, and there's also a little computer entry on that to show where that wire transfer came from, and that wire transfer came from Harold David Linden. That's what's on that bank statement.

And you're also going to see in those bank records that on November 1, 1989, which is the same date that Mr. White went to the Department of Vital Records and obtained the birth certificate, he wrote a check to carbon his attorney trust account, essentially a check to cash that would allow him to go

into the bank and cash and take funds out of that account, and that check was in the amount of $2,600, and on the little notation portion of the check, down on the left-hand corner is stated, "Documents of identification per blank."

You're going to hear from the witnesses who were involved in this, and essentially you're going to have to make a determination as to whether or not Mr. White engaged in a fraud on the United States government in assisting Mr. Linden in attempting to gain this passport, and the critical issue you're going to have to decide is at the time the birth certificate was obtained on November 1st and at the time the passport was obtained on November 13th, did Mr. White know that the individual, Mr. Linden, was not William Smith [I-12] Baldwin, and if you find from the evidence that Mr. White knew

when he obtained the birth certificate as well as when the passport was applied for that that individual who he was assisting was not really William Smith Baldwin, then the evidence is sufficient so that you must convict Mr. White of the charges against him.

That's the critical issue. That's what you should be looking for, and it's the government's position that that's what the evidence will show as you listen to it over the next two days. Thank you very much for your attention.

THE COURT: Thank you, sir.

Mr. Jones?

OPENING STATEMENT

BY MR. JONES:

May it please the Court, Government counsel, Ladies and Gentlemen: As you might expect, we have a different story to tell. Fundamentally, this is going to be

a very simple case, and we would ask that because the government first goes forward and then the defendant goes forward, that in order to see the total picture, you're going to be patient.

And what we intend -- the picture we intend to paint is going to be quite different in that all times relevant to this proceeding, that man, Mr. Blaine White, Attorney Blaine White knew Mr. Harold Linden as William Baldwin, Bill Baldwin. [I-13] Their relationship goes back approximately six years, to mid-1980s. Mr. White at that time was with the law firm Mitchell, Mitchell, & Mitchell in Baltimore, and Mr. White met who he then believed to be Mr. Baldwin through some business contacts.

They met in New York city on a commodities deal, they had some other commercial dealings, and as an offshoot of

that, their was some dialogue with regard to different business enterprises, and they stayed in touch for a number of years. As a matter of fact, in the mid-1980s, shortly thereafter, Mr. White went to the United Kingdom, to England, on business. We will offer evidence in that regard. At that time, he was still known as Bill Baldwin.

And so they had stayed in touch for a number of years, until 1987. During that period of time, Mr. White knew that Mr. Baldwin was in Florida. The reason why he had been in New York when they first met was because Mr. Baldwin's then first wife had died -- was on her death bed and receiving treatment in a New York hospital.

Sometime thereafter, in approximately 1987, the communication between Mr. Baldwin and Mr. White stopped.

Then in approximately August of last year,

Bill Baldwin calls up Mr. White, he had represented him in the past, and wanted to seek some more representation.

Again, this was in regards to a commercial deal.

APPENDIX Q

ORAL ARGUMENT SCHEDULED FOR MAY 2, 1991

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-3021

UNITED STATES OF AMERICA,
Appellee,

v.

BLAINE A. WHITE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

JAY B. STEPHENS,
United States Attorney.

JOHN R. FISHER,
THOMAS J. TOURISH, JR.,
ERIC A. DUBELIER,
BARRY WIEGAND,
Assistant United States
Attorneys.

Cr. No. 90-00427-01 (TFH)

The Defense Evidence

Appellant testified in his own behalf, essentially admitting the acts of securing a copy of a birth certificate in the name of William Smith Baldwin for Linden and of filing an affidavit supporting Linden's application for a U.S. passport for Linden in the name of Baldwin (Tr.II 53-55, 58, 63-65).[1] Appellant contended, however, that he had always known Linden as Baldwin and had met him as such in 1984 (Tr.II 35-36)....

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[1] Appellant was his sole fact witness; he also called three character witnesses, including former U. S. Rep. Parren J. Mitchell (D-Md.), who testified to appellant's good reputation for honesty (Tr.II 96-107).

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	:	
	:	
	:	
vs.	:	Criminal No.
	:	CR 90-0427-91
	:	(TFH)
	:	
Blaine A. White,	:	
	:	
Defendant.	:	

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE INTRODUCTION OF EVIDENCE OR, AND REFERENCE TO, MENTIONING, OR SOLICITING INFORMATION CONCERNING EITHER THE APPLICATION FOR BIRTH ABSTRACT OR, THE BIRTH RECORD OF WILLIAM SMITH BALDWIN DECEASED

Defendant, Blaine A'mmon White, by and through counsel undersigned, moves this Court exclude all evidence of and or information concerning the application for birth record abstract, the birth record of William Smith Baldwin, deceased, and for exclusion of any and all evidence of the manner in which the same were obtained by defendant and for reasons states:

1. Defendant, Blaine A'mmon White, was acquitted of violation of 18 U.S.C. sec. 1028 (a) (4) and 2, incident to knowingly possessing a birth record of on William Smith Baldwin with intent to defraud the United States.

2. Defendant, was reindicted in October 1990 for passport fraud and associated violations of the U.S. Criminal Code which trial is to begin on or about March 2, 1992.

3. The Government has served defendant with proposed stipulations which indicate that the Government intends to introduce evidence of the violations for which defendant has been acquitted.

4. The Government may not reprove the conduct of defendants involving the birth certificate offense unsuccessfully prosecuted under the first indictment. See U.S. v. White, 936 F.2d

1326 at 1330 (D.C. Cir. 1991).

Wherefore, defendant prays this Court for an order excluding any and all evidence of or reference to the birth abstract record application, the birth record, and the conduct via which defendant obtained the same.

Respectfully submitted,

James Benny Jones
Bar No. 345322
1129 Twentieth St. N.W.
Suite 400
Washington, D.C. 20036
(202) 296-0221

CERTIFICATE OF SERVICE

I, the undersigned, certify this 28th day of February 1992 that a true and complete copy of the aforegoing Motion to Exclude, etc. was mailed first class postage, pre-paid to Eric Dubelier, Assistant United States Attorney, 555 4th Street N.W., 5th Floor, Washington, D.C. 20001.

James Benny Jones, Esquire

No. 93-796

In the Supreme Court of the United States

OCTOBER TERM, 1993

BLAINE A'MMON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the jury at petitioner's first trial, which acquitted him on one count and was unable to reach a verdict on another count, decided an issue of fact in his favor that would preclude reprosecution on the count on which the jury was unable to reach a verdict.

2. Whether petitioner's retrial violated the Double Jeopardy Clause because the charges on which he was convicted in the second trial involved the same conduct as the charge on which he was acquitted in the first trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-796

BLAINE A'MMON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A27) is reported at 1 F.3d 13. A prior opinion of the court of appeals (Pet. App. B2-B23) is reported at 936 F.2d 1326. The opinion of the district court (Pet. App. C2-C31) is reported at 757 F. Supp. 45.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1993. A petition for rehearing was denied on October 1, 1993. Pet. App. D2, E2. The petition for a writ of certiorari was filed on November 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of making false statements in a passport application and of aiding and abetting the commission of that offense, in violation of 18 U.S.C. 1542. He was sentenced to 12 months' imprisonment. The court of appeals affirmed. Pet. App. A2-A27.

1. In 1989, petitioner, who is an attorney, represented a client who wanted to obtain a United States passport. On November 1, 1989, petitioner obtained from the Maryland vital records office a certified copy of a birth certificate bearing the name William S. Baldwin. Petitioner's client later applied for a passport in the name of William Baldwin, submitting the birth certificate as proof of his identity. On November 13, petitioner signed an affidavit in support of the passport application, in which he identified the applicant as William Baldwin and stated that he had known the applicant for five years and that he knew the applicant was an American citizen. Pet. App. A3-A4; Pet. App. B6-B8.

2. A federal grand jury returned a two-count indictment charging petitioner with possessing an identification document with the intent that it be used to defraud the United States, in violation of 18 U.S.C. 1028(a)(4), and making false statements in a passport application, in violation of 18 U.S.C. 1542. Pet. App. A4-A5.

At trial, the government introduced evidence that petitioner had been involved in a scheme to obtain false identification documents for Harold Linden, a Canadian citizen who was residing in the United States illegally, and that in connection with the

scheme he had provided Linden with a false birth certificate and with a Social Security number belonging to another client of petitioner's law firm. The evidence showed that the real William S. Baldwin had died on October 30, 1989, and that his obituary had appeared in the newspaper the day before petitioner applied for the birth certificate. An official from the vital records office testified that petitioner had obtained the birth certificate under a special procedure that the office used to allow attorneys to obtain records of deceased persons. Pet. App. A5-A6; Pet. App. B7.

In his defense, petitioner testified that the man identified at trial as Harold Linden had always been known to him as William Baldwin and that he was unaware that there was any special procedure for obtaining deceased persons' records. Petitioner claimed that he had no idea he was acquiring a dead person's birth certificate, and he asserted that the affidavit he signed in support of his client's passport application was true to the best of his knowledge. Pet. App. A6.

The jury acquitted petitioner on the document fraud count, but it was unable to reach a verdict on the count charging petitioner with making false statements in a passport application. The district court declared a mistrial on the "hung" count and dismissed the charge without prejudice. Pet. App. A6-A7.

3. Thereafter, the grand jury returned a second indictment. That indictment charged petitioner with making false statements in a passport application, the charge on which the jury had failed to reach a verdict. In addition, it charged petitioner with conspiring to

commit offenses against the United States, in violation of 18 U.S.C. 371; shielding an illegal alien from detection, in violation of 8 U.S.C. 1324(a)(1)(C); and aiding and abetting the making of false statements in a passport application, in violation of 18 U.S.C. 1542. Pet. App. A7; Pet. App. B9-B10.

Petitioner moved to dismiss the charges on collateral estoppel and double jeopardy grounds. First, he argued that by acquitting him on the document fraud count, the jury in the first trial conclusively determined that he did not know that Harold Linden was not William Baldwin, and that any subsequent prosecution that called into question that jury determination was barred by the collateral estoppel component of the Double Jeopardy Clause. Second, petitioner contended that the government was barred from prosecuting him on the charges in the second indictment because those charges involved the same conduct as the charge on which he was acquitted. Finally, petitioner argued that even if the government could proceed with the second prosecution, his acquittal on the document fraud count precluded the government from introducing evidence of his conduct in obtaining the birth certificate. Pet. App. C12-C30.

The district court denied the motion. Pet. App. C2-C31. The court rejected petitioner's claim that his acquittal on the document fraud count meant that the jury had necessarily determined that he did not know Linden's true identity. The court explained that "the jury "could have found that [petitioner] possessed the birth certificate on November 1, 1989, but did not have the intent to defraud the United States at that time," or "could have found that [petitioner] had the requisite intent on November 13, 1989, but did not

possess the birth certificate on that date." Pet. App. C18-C19. The court concluded that because "issues * * * other than the issue of knowledge of Mr. Linden's identity * * * could have accounted for [petitioner's] acquittal" on the document fraud count, petitioner had failed to show that his acquittal precluded the government from relitigating that issue. Pet. App. C19.

The district court also rejected petitioner's "same conduct" claim, stating that "the instant indictment does not charge [petitioner] with the same conduct [with] which he was charged in [the first indictment]." Pet. App. C21-C22. With respect to petitioner's claim that the government was barred from reintroducing evidence of his conduct in obtaining the birth certificate, the court noted that "[t]he government concedes that it will be precluded from arguing to the jury that [petitioner] possessed the birth certificate on November 1 and 13, 1989 with the intent to defraud the United States Government." Pet. App. C26. The court stated, however, that "since the government has established that [petitioner's] acquittal on [the document fraud count] could have been based on several factors," evidence introduced in the first trial that "did not have a direct bearing" on either count of the first indictment could be reintroduced in the second trial. Pet. App. C26-C27.

4. Petitioner took an interlocutory appeal from the district court's order, and the court of appeals affirmed. Pet. App. B2-B23. The court of appeals rejected petitioner's claim that his acquittal on the document fraud count meant that the jury had necessarily determined that he believed his client was William Baldwin. The court observed that had the

jury found, as petitioner contended, that he "actually believed Linden to be William Baldwin," it "could have found that [petitioner] did not wilfully make a false statement in the passport application" and would have acquitted him on the passport fraud count as well. Pet. App. B15-B16. Thus, the court stated, accepting petitioner's argument would require it "to assume that the jury acted inconsistently, reaching opposite findings on the same issue in the different counts." Pet. App. B17. Because it was "loath to impute such inconsistency to the jury," the court held that petitioner had not established that the issue of his knowledge of Linden's true identity was in fact determined in the first trial. *Ibid.* Accordingly, the court concluded that the doctrine of collateral estoppel did not bar the government from relitigating that issue under the second indictment. *Ibid.*

Petitioner also renewed his claim, citing *Grady* v. *Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause barred the government from retrying him because, in order to prove the offenses charged in the second indictment, it would be required to prove conduct for which he had been prosecuted under the first indictment. The court of appeals concluded that it "need not reach this argument," observing that the government had conceded that it "may not reprove the conduct involving the birth certificate offense unsuccessfully prosecuted under the first indictment." Pet. App. B21.

5. At petitioner's second trial, the jury convicted petitioner of making false statements in a passport application and of aiding and abetting that crime. The jury acquitted petitioner on the other counts. Pet. App. A10.

6. In the court of appeals, petitioner again argued that under *Grady* v. *Corbin*, *supra*, his retrial violated the Double Jeopardy Clause because the government had prosecuted him for the same offense of which he had been acquitted in the first trial. The court of appeals rejected petitioner's reliance on *Grady*, noting that that decision had been overruled and that "the Supreme Court has made clear that the * * * *Blockburger* test is the sole test for determining whether the crimes charged in successive prosecutions are the 'same offense' for double jeopardy purposes." Pet. App. A11 (citing *United States* v. *Dixon*, 113 S. Ct. 2849 (1993)). The court explained that "[t]he *Blockburger* analysis focuses strictly on the statutory elements of crimes: two offenses are not the same as long as each requires proof of an element the other does not." Pet. App. A11 (citing *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

Applying that analysis, the court had "little doubt that document fraud under 18 U.S.C. § 1028(a)(4) is not the same offense as either passport fraud or aiding and abetting passport fraud under 18 U.S.C. §§ 1542 & 2." Pet. App. A11-A12. The court reasoned that "[d]ocument fraud under section 1028 requires possession of an identification document, while passport fraud under section 1542 requires proof that the accused made a false statement in a passport application." Pet. App. A12-A13. Thus, the court stated, the elements of the two offenses "could hardly be more distinct." Pet. App. A13. Moreover, in order to convict petitioner of aiding and abetting passport fraud, the government "must prove the same elements of passport fraud—which, as we have already noted, are different from those for the offense of [document

fraud] described in section 1028—and then must prove aiding and abetting." Pet. App. A13-A14. The court concluded that "sans *Grady*, which directed Double Jeopardy analysis to the government's reproof of the same conduct, [petitioner] is left without support for his Double Jeopardy claim." Pet. App. A14-A15.

Petitioner asked the court of appeals to reconsider its ruling that the doctrine of collateral estoppel did not bar the government from relitigating the issue of his knowledge of Linden's true identity. The court, however, declined to revisit that question, stating that "[w]e have already held * * * that the jury in the first trial did not conclusively determine that [petitioner] did not know Linden's true identity. * * * That holding is the law of the case, and there is no reason for us to disturb it." Pet. App. A15 n.1.

ARGUMENT

1. Petitioner renews his claim (Pet. 16-23) that the doctrine of collateral estoppel barred his retrial for making false statements in a passport application following his acquittal of document fraud. Petitioner contends that the first jury must have determined that he believed that Linden was actually William Baldwin, and that the government was foreclosed from relitigating that issue in the second trial. The court of appeals correctly concluded that the collateral estoppel doctrine did not bar petitioner's retrial.

a. In our view, the doctrine of collateral estoppel should never bar the government from retrying a defendant on a count as to which a jury was unable to reach a verdict, when the same jury has acquitted the defendant on one or more other counts. This Court's cases establish that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."

Richardson v. *United States*, 468 U.S. 317, 324 (1984). As this Court has noted in a slightly different context, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984).

The rationale underlying the collateral estoppel doctrine does not justify precluding a retrial where a jury has failed to reach a verdict on one or more counts of a multi-count indictment while acquitting the defendant on other counts. Under the doctrine of collateral estoppel, an acquittal on one charge bars the government from proceeding on another charge only if the jury in acquitting the defendant decided some fact in his favor that the government had to prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe* v. *Swenson*, 397 U.S. 436, 443-445 (1970); see also *Dowling* v. *United States*, 493 U.S. 342, 347-348 (1990). Where the jury has acquitted a defendant on some charges while failing to reach a verdict on others, there are two explanations for the mixed verdict.

First, it is possible that the jury acquitted the defendant by finding that the government failed to prove some fact that would not be necessary for conviction on the count on which the jury failed to reach a verdict. If so, the collateral estoppel doctrine simply has no application, and reprosecution on the "hung" count is permissible. See *Dowling* v. *United States*, 493 U.S. at 347-348.

Second, it is possible that the jury acquitted the defendant by finding that the government failed to prove some fact that was necessary for conviction on

the count on which the jury failed to reach a verdict. In that case, however, the jury's failure to acquit the defendant on the second charge would be inconsistent with its acquittal on the first. This Court has held that "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" when the jury's verdict itself is inconsistent. *United States* v. *Powell*, 469 U.S. 57, 68 (1984). See also *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in itself, for not giving preclusive effect to the acquittals"). Accordingly, the hypothesis that the jury acted inconsistently would also fail to make out a collateral estoppel claim.

Under either explanation, the defendant cannot make the necessary showing that the jury found in his favor on a fact necessary to conviction on the count on which the jury was unable to reach a verdict. Accordingly, retrial on the "hung" count is always permissible in that situation.

b. While not rejecting the above analysis, the court of appeals followed a somewhat different route to the conclusion that collateral estoppel is not applicable here. In addressing the collateral estoppel claim, the court of appeals properly examined "the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe* v. *Swenson*, 397 U.S. at 444. The court found that it was of particular relevance that the count that petitioner seeks to preclude was itself at issue in the prior prosecution, but that the jury was unable to reach a verdict on it. As the court explained, "[h]ad the jury found, as [petitioner]

contends, that he actually believed Linden to be William Baldwin, it would have acquitted him on the [passport fraud] count as well as the [document fraud count]." Pet. App. B15-B16. Since the court was "loath to impute such inconsistency to the jury," Pet. App. B17, it held that the jury "must have based the [document fraud] acquittal on a finding other than that which [petitioner] urges." Pet. App. B16.[1]

The court's reasoning is similar to that employed by the First Circuit in *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert. denied, 113 S. Ct. 105 (1992). In that case, the defendant was acquitted in her first trial of importation of cocaine, but the jury was unable to reach a verdict on the charge that she possessed cocaine with intent to

[1] Although the court of appeals did not find it necessary to specify further precisely what finding the jury reached in acquitting petitioner on the document fraud count, the district court did offer an explanation of how the first jury could have acquitted petitioner on the document fraud count without deciding in his favor any issue of fact necessary to conviction on the passport fraud count. The district court noted that the jury could have found that petitioner did not have the requisite intent to defraud the United States at the time he obtained the birth certificate or while he had it in his possession. Pet. App. C18-C19. The jury might have concluded that, during that period, petitioner intended to use the birth certificate to defraud some other entity or for some other purpose. Petitioner argues (Pet. 17, 19-20) that that was unlikely, because the closing arguments focused the jury's attention not on that issue, but on an issue that the government had to prove in order to convict petitioner on either count: whether petitioner knew that Linden was not the individual named in the birth certificate. The jury, however, was not limited to reaching a verdict solely on the basis of the issues addressed by counsel in closing arguments.

distribute it. The court of appeals rejected her contention that the jury had found that she did not know that cocaine was in certain packages that she picked up at a post office—a finding that would have required an acquittal on both counts. Citing the court of appeals' decision in this case and this Court's decision in *Powell*, the First Circuit held that it "cannot find that a rational jury could have been so inconsistent as to find 'no knowledge' as to one count, and 'knowledge' as to the other." 957 F.2d at 24. In addition, the court found that there was an explanation for the mixed verdict that would have made the jury's conduct with respect to the two counts entirely consistent: the jury could have found that petitioner did not cause the importation of the cocaine, but then deadlocked as to whether petitioner intended to distribute it. *Id.* at 25.

Three courts of appeals have approached the issue differently. In *United States* v. *Seley*, 957 F.2d 717, 722-723 (9th Cir. 1992), the court held that an acquittal on one count of a multi-count indictment barred reprosecution on another count, on which the jury had failed to reach a verdict. The court held that the jury's failure to acquit on the "hung" count—notwithstanding its finding of an essential fact in the defendant's favor—did not create "the logically inconsistent mixed verdict of acquittals and convictions to which *Powell* applies." *Id.* at 723.

Similarly, in *United States* v. *Frazier*, 880 F.2d 878, 885-886 (1989), cert. denied, 493 U.S. 1083 (1990), the Sixth Circuit applied the collateral estoppel doctrine to bar retrial on a "hung" count based on a simultaneous acquittal on another count. The court rejected the argument that a jury's simultaneous

acquittal and failure to reach a verdict could amount to the kind of inconsistency that would trigger the *Powell* rule that no factual finding in the defendant's favor can be deduced from inconsistent verdicts. 880 F.2d at 882-883.

Finally, *United States* v. *Bailin*, 977 F.2d 270, 276-280 (7th Cir. 1992), applied a similar rule in a slightly different context. In *Bailin*, the jury was unable to reach a verdict on a RICO charge, but acquitted the defendant on counts charging some—but not all—of the RICO predicate acts. The court of appeals held that the government could not charge the counts on which the defendant had been acquitted as predicate acts when it reprosecuted the RICO count. In reaching that conclusion, the court refused to apply the *Powell* rule, holding that "the jury's failure to reach a verdict is too inconclusive to qualify as inconsistent [with the acquittal] for the purposes of issue preclusion." *Id.* at 280 (internal quotation marks and brackets omitted). See also *Ferrell* v. *State*, 567 A.2d 937, 944-945 (Md.), cert. denied, 497 U.S. 1038 (1990).

There is considerable tension between the decisions in *Seley*, *Frazier*, and *Bailin*, which refused to treat mixed verdicts of the sort at issue here as "inconsistent" for purposes of the *Powell* rule, and the decisions in this case and *Aguilar-Aranceta*, which expressly referred to such verdicts as "inconsistent." But it cannot be said that there is at this time a conflict. Although the courts in this case and *Aguilar-Aranceta* both relied on this Court's decision in *Powell*, neither court expressly held that it would apply the *Powell* rule if it had found the mixed verdict to be inconsistent; both courts merely

held that the need to avoid imputing such inconsistency to the jury was (at least) an important factor suggesting that the jury's acquittal had to be rationally explicable on some other basis.[2] Similarly, the courts in *Seley*, *Frazier*, and *Bailin* did not hold that the jury's failure to reach a verdict was necessarily entirely irrelevant in determining what facts the jury found in acquitting the defendant on other counts; those courts merely found that, on the particular facts of those cases, the defendants had made out their collateral estoppel claims.

In sum, no court of appeals has held that a mixed verdict like the one in this case cannot collaterally estop retrial on the "hung" count, and no court of appeals has held that the fact that the jury failed to reach a verdict on the hung count is of no relevance in determining whether the defendant has made out a collateral estoppel claim. Accordingly, it is not at

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[2] As noted above, see note 1, *supra*, the court of appeals in this case did not find it necessary to offer any explanation of the jury's acquittal on the document fraud count that would render it consistent with the jury's failure to reach a verdict on the passport fraud count. That suggests that the court may have believed that the need to avoid imputing any inconsistency to the jury was sufficiently great to establish, as a matter of law, that the jury did not find any fact in petitioner's favor that would preclude reprosecution on the "hung" count. If so, the court's position is equivalent to our position that collateral estoppel may never be applied to convert an acquittal on one count into an acquittal on another count on which the jury failed to reach a verdict. But the court of appeals' opinion stated that it was "loath" to impute an inconsistency to the jury (Pet. App. B17), not that it would refuse to do so, and the court did not expressly state that, if it did find such an inconsistency, it would refuse to apply the collateral estoppel doctrine to bar a retrial.

present clear whether the differences between the D.C. and First Circuits, on the one hand, and the Sixth, Seventh, and Ninth Circuits, on the other, are mere differences in emphasis and terminology or represent a more fundamental conflict concerning the proper treatment, under *Powell*, of a mixed verdict like the one in this case. Since it cannot be concluded at present that there is a conflict in the circuits, further review is unwarranted.

2. The question presented in the petition relates only to the application of the collateral estoppel doctrine in cases in which a jury returns a verdict of acquittal on one count of a multi-count indictment and fails to reach a verdict on another count. See Pet. i. Petitioner nonetheless contends in the portion of the petition entitled "Argument" that further review is warranted to determine, apart from the collateral estoppel doctrine, "what protection, if any, is afforded a criminal defendant with respect to having to relitigate prior acquitted conduct." Pet. 26. In particular, petitioner contends (Pet. 24-29) that his second trial violated the Double Jeopardy Clause because the passport fraud offenses on which he was convicted involved the same conduct as the document fraud count on which he was acquitted. In the court of appeals, petitioner based that argument on this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990).

Petitioner's claim is foreclosed by this Court's decision in *United States* v. *Dixon*, 113 S. Ct. 2849 (1993), in which the Court overruled *Grady*, see 113 S. Ct. at 2859-2864, and held that the sole test for determining whether two offenses are separate offenses for double jeopardy purposes is that set forth in *Block-*

burger v. *United States*, 284 U.S. 299, 304 (1932)—*i.e.*, "whether each offense contains an element not contained in the other."[3] 113 S. Ct. at 2856. Petitioner does not challenge the court of appeals' ruling (Pet. App. A11-A14) that document fraud and passport fraud are separate offenses under the *Blockburger* test. Accordingly, further review to reconsider this Court's holding in *Dixon* is unwarranted.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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FEBRUARY 1994

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[3] Petitioner attempts to distinguish *Dixon* (Pet. 25) by pointing out that it involved a "contempt proceeding" rather than "substantive offenses." The Court observed in *Dixon*, however, that "criminal contempt, at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense,'" and it held that the Double Jeopardy Clause applied in nonsummary criminal contempt prosecutions just as in other criminal prosecutions. 113 S. Ct. at 2856 (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)).

[4] Petitioner's claim that the law remains unsettled after *Dixon* rests primarily on Justice Souter's dissent in that case. See Pet. 24-26. The Court in *Dixon*, however, specifically addressed and rejected the reasoning of the dissenting opinion. See 113 S. Ct. at 2860-2863.

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No. 93-796

SUPREME COURT OF THE UNITED STATES
October Term, 1993

Blaine A'mmon White, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY FOR THE PETITIONER TO THE BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 1 F.3d 13 (Pet. App. A2 - A27). The companion opinion of the court of appeals is reported at 936 F.2d 1326 (Pet. App. B2 - B23). The district court opinion is reported at 757 F.Supp. 45

(Pet. App. C2 - C31).

JURISDICTION

The jurisdiction of this court rests on Title 28 U.S.C. A § 1254 (1).

STATEMENT

Petitioner filed his petition for a writ of certiorari on November 19, 1993. The government requested and was granted two (2) extensions of time in which to file its in opposition; filed February 2, 1994. Petitioner received the government's opposition on February 4, 1994. Herein Petitioner files his reply.

ARGUMENT

1. The government advances two (2) reasons for denying further review of Petitioner's collateral estoppel claims; (1)..."that the jury acquitted defendant [Petitioner] by finding that the government failed to prove some fact that would not be necessary for conviction on

the count on which the jury failed to reach a verdict." (2)..."that the jury acquitted the defendant [Petitioner] by finding that the government failed to prove some fact that was necessary for conviction on the count which the failed to reach a verdict." (Opp.9-10) With respect to the government's first argument it contends that collateral estoppel does not apply. Regarding the government's second argument it contends that the verdict would be inconsistent. Both of the government's arguments are unavailing.

a. The government's initial position fails because it overlooks the fact that Petitioner had but one, single issue, defense as to all counts in both proceedings; lack of knowledge. (Pet. App. B13-B14, O4, P4-P8, and Q13). The government does not challenge the accuracy of Petitioner's, single issue, defense

assertion. Applying this Court's rationale in *Ashe v. Swenson* 397 U.S. 436 (1970) leads to the conclusion that the "ultimate" issue was knowledge, and that that issue was decided in Petitioner's favor. *Ashe* makes it clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. *Id. 444.* With all due respect to the district court, the tortured collateral estoppel analysis which it applied to Petitioner's case is the very type *Ashe*, cautions against. In addition, the evidence at Petitioner's first trial did not support the district court's analysis. If a court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the

defendant [Petitioner] did not contest, the possible multiplicity of [successive] prosecutions is staggering. ***In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel "...*Id.*, n.9, (Citations omitted). The kernel of this Court's admonition with respect to the application of the collateral estoppel rule is simplicity. The said simplicity is dependent upon actual circumstances rather than the hypothetical. Therefore, the only rational conclusion which can be reached in this matter is that the jury, by its acquittal of Petitioner upon the document fraud count, resolved the "ultimate" issue of knowledge in Petitioner's favor. In light of the fact that Petitioner's only defense in the second prosecution was again lack of knowledge, the government should have been

estopped from relitigating that issue. Thus, the Petitioner is entitled to have his petition for writ of certiorari granted.

b. The government's second argument turns a blind eye to the fact that unlike *United States v. Powell* 496 U.S. 57 (1984) the case at bar does involve inconsistent verdicts. There was no verdict reached on the second count of the initial indictment. The verdict of guilty against a Petitioner was returned by the subsequent jury. Therefore, the task of a reviewing court with respect to Petitioner's acquittal is to ascertain what effect the said acquittal had upon the retrial of Petitioner where again the only issue was lack of knowledge. The jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purpose of issue preclusion.

United States v. Bailin, 977 F.2d 270, 279-280 (7th cir. 1992), citing *United States v. Seley*, 957 F.2d 717, 723 (9th cir 1992). Moreover, "[t]he mere possibility that the jury acted irrationally, without more, will not negate the collateral estoppel effects [sic] of a prior verdict if a rational interpretation of the verdict as whole is possible." *Seley, Id., citing Pettaway* (citations ommitted). Thus, the inconsistent verdict issue is not applicable to the case at bar.

The government points out in its opposition that the court of appeals offered no explanation for the jury's acquittal of Petitioner with respect to the document fraud count. Opp. 11 n.1 and 14 n.2. Petitioner submits that he is entitled, at the very least, to an analysis of the collateral estoppel issue

by the reviewing court such that the legitimacy of said claim can be intelligently obtained. In Petitioner's view an analysis employing the principals of *Ashe, infra,* would lead to a conclusion that the "ultimate" issue (knowledge) was determined in Petitioner's favor by virtue of his document fraud acquittal. In light of the aforegoing, Petitioner is entitled to further review of his collateral estoppel claim upon a writ of certiorari.

c. The government suggests that there is "considerable tension" between the circuits as to application of the collateral estoppel doctrine. However, the government will not go so far as to admit that a conflict exists therein. Opp. 13. Petitioner calls the Court's attention to Webster's ninth edition, New Collegiate Dictionary, which defines "tension" as ...unrest...a state of latent

hostility or opposition between individuals or groups...,"Conflict" is defined, in that same volume, as ...antagonistic...divergent...ideas... discord... Therefore, Petitioner submits that the government is hiding behind semantics. The First Circuit and the District of Columbia Circuit hold views with respect to the application of the collateral estoppel doctrine which are divergent from, and in opposition to, the views held by the Seventh and Ninth Circuits respectively. Therefore, this court should grant certiorari so that the "tension" might be abated and the "conflict" resolved. Petitioner is entitled to a further review by this Court.

Furthermore, the government contends that the court of appeals holding in Petitioner's case was similar to that in

United States v. Aguilar-Aranceta, 957 F.2d 18 (1st Cir.), Cert. denied (1992) which followed and cited Petitioner's interlocutory appeal; *United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991). *Aguilar-Aranceta* is distinguishable from the case at bar on facts. In *Aguilar-Aranceta* there were two (2) issues involved in the acquitted count: "knowledge" and "willfulness", 957 F.2d at 25. The jury instructions therein required the government to prove both in order to obtain a conviction. The First Circuit in its collateral estoppel analysis considered these facts in reaching the conclusion that collateral estoppel did not apply. *Id.* By contrast at Petitioner's initial trial the only issue the government had to prove to obtain a conviction upon the document count fraud (upon which Petitioner was

acquitted) was Petitioner's "knowledge"; the other elements were admitted. The jury instructions in Petitioner's case reflect the fact that the only issue to be determined was "knowledge" with respect to both the document fraud **AND** the passport fraud counts. Pet. App. J2-J4. (Emphasis added.) Therefore, the only issue in controversy, and the only element that the government had to prove in the case in which Petitioner was acquitted was "knowledge." Thus, *Aguilar-Aranceta* is distinguishable from the case at bar. In *United States v. Powell, infra*, this Court held that juries are presumed to act rationally. The aforesaid presumption leads to the conclusion that since the jury had only one issue before it (knowledge) that that was the issue which the jury decided in Petitioner's favor. Therefore, Petitioner has met his burden

of proof and is entitled to the application of the collateral estoppel doctrine. Consequently, this court should grant Petitioner a writ of certiorari.

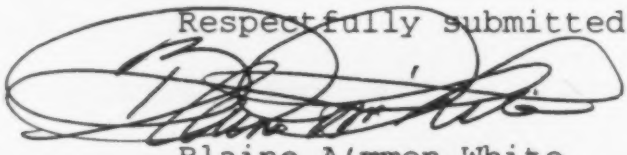
2. The government contends that Petitioner's double jeopardy claim is foreclosed by this Court's decision in *United States v. Dixon* 113 S.Ct. 2849 (1993). Opp. 15. Nevertheless, Petitioner contends that *Dixon* is not the final arbiter of Petitioner's double jeopardy claim. Petitioner submits that *Dixon* did not reverse *Illinois v. Vitale*, 447 U.S. 410 (1980), *Brown v. Ohio*, 432 U.S. 161 (1977), *Harris v. Oklahoma*, 433 U.S. 682 (1977) and *In re Nielsen* 131 U.S. 176 (1889). Based upon the line of precedent above, *Dixon* not withstanding, criminal defendants have additional double jeopardy protection. Therefore, a further review is warranted such that this Court might

give definition to what those protections are. Additionally, the government's opposition failed to address Petitioner's request for a special limiting jury instruction at his second trial with respect to his prior acquitted conduct. Pet. App. K 2. The court of appeals made no ruling as to the merit of Petitioner's jury instruction request which the district court denied. Petitioner is entitled to have the jury instruction issue resolved here. Petitioner submits that the unfettered use of prior acquitted conduct at his second trial violated Petitioner's Fifth Amendment protection against double jeopardy. Therefore, a further review is warranted and this Court should grant Petitioner a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Blaine A'mmon White

February 1994